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REPORTS OF CASES

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DECIDED IN

THE SUPREME COURT

OF THE

STATE OF UTAH

HARMEL L. PRATT
REPORTER

VOLUME L

May, 1917, to November, 1917.

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The terms of the United States District Court of Utah are held as follows: At Salt Lake City, second Monday in April and November; at Ogden, second Monday in March and September.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF UTAH

(Continued from Volume 49)

TYNG v. CONSTANT-LORAINÉ INV. CO.

No. 3029. Decided May 8, 1917. (165 Pac., 509.)

1. **VENDOR AND PURCHASER—OPTION—MEETING OF MINDS—RECOVERY OF PAYMENT.** If minds of parties executing option agreement failed to meet upon question of amount of land to be conveyed plaintiff could recover from defendant amount paid thereunder. (Page 8.)
2. **APPEAL AND ERROR—FORMER APPEAL—REVERSAL—NECESSITY OF SUBSTANTIAL ERROR.** After two appeals had previously been taken and four juries had passed on the facts and found in plaintiff's favor, judgment will not be interfered with unless defendant has been prejudiced in some substantial right during progress of trial or in submission of case to jury. (Page 9.)

Appeal from the District Court, Third District: *Hon. T. D. Lewis*, Judge.

Action by Charles Tyng against the Constant-Lorraine Investment Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Howat, Marshal, Macmillan & Nebeker and *Robert H. Butterfield* for appellant.

Pierce, Critchlow & Barrette for respondent.

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FRICK, C. J.

The plaintiff brought this action to recover the sum of \$1,000 from the defendant, which plaintiff alleged the defendant wrongfully retained from him. This case has been here on appeal twice before. *Tyng v. Constant-Lorraine Inv. Co.*, 37 Utah, 304, 108 Pac. 1109; *Id.*, 47 Utah, 330, 154 Pac. 767. Plaintiff recovered in both trials, but the judgments in his favor were reversed on defendant's appeals. On the last trial the plaintiff again prevailed, and the defendant again appeals.

In view of the former opinions, to which we specially refer, and for the reason that both parties in their respective briefs state that "the evidence in this case is practically identical with that introduced on the previous trial of the case," we shall not state more of the record than is absolutely necessary to an understanding of the points decided.

The controversy between the parties arose out of what is termed an option agreement to purchase certain real property in Salt Lake City. The transaction in question, however, arose between one R. A. Rowan, of Los Angeles, as the president of the defendant company, on the one hand, and the Equity Investment Company, a Utah corporation, upon the other. The plaintiff, however, succeeded to all of the rights of said company by assignment before the action was commenced. The transactions in question here were initiated by one Thomas E. Rowan, a real estate broker of Salt Lake City, by a telegram dated September 4, 1907, which was transmitted to said R. A. Rowan at Los Angeles. The telegram reads:

"Advise cash price west side State, taxes prorated, whether leased."

The telegram was addressed to R. A. Rowan for the reason that the title to the property inquired about was in him. On the following day R. A. Rowan wired as follows:

"Will accept fifty thousand. Property now mortgaged for twenty thousand at five per cent. Leases very short. See Kelsey & Gillespie for exact information."

To that telegram Thomas E. Rowan, on the same day, replied:

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“Responsible party offers one thousand for thirty days’ option. Recommend.”

In response to the foregoing R. A. Rowan wired as follows:

“Will accept one thousand for thirty days’ option for property west side State street. Price fifty thousand, subject to twenty thousand mortgage. Balance, thirty thousand, to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with National Bank of Republic, they to notify me by wire.”

Upon receipt of the foregoing telegram the Equity Investment Company deposited with the bank aforesaid \$1,000, and received from said bank the following writing:

“Salt Lake City, September 9, 1907. Received of the Equity Investment Company one thousand (\$1,000.00) dollars as a deposit on account of the purchase price of the following described real property in the county of Salt Lake, state of Utah: [Describing the parcel of ground 55 feet by 165 feet]—which property the Equity Investment Company agrees to buy for the sum of fifty thousand (\$50,000.00) dollars, payable as follows: Thirty thousand (\$30,000.00) dollars on or before thirty days from the date of this receipt. The above mentioned deposit of one thousand (\$1,000.00) dollars to be applied as a part of said payment, the balance of twenty thousand (\$20,000.00) dollars to be covered by a mortgage for that amount now on the property, which mortgage the Equity Investment Company agrees to assume and pay; the property to be deeded by a warranty deed free of all incumbrances except aforesaid mortgage of twenty thousand (\$20,000.00) dollars and the general taxes for the year 1907. The Equity Investment Company agrees to pay their proportion of the said taxes from the date possession is delivered to them. This deposit is made with the National Bank of the Republic, and accepted by them under authority of the following telegram from R. A. Rowan: ‘Los Angeles, Calif., Sept. 6, 7, 1907. Thos. E. Rowan, Salt Lake City, Utah: Will accept one thousand for thirty days’ option for property west side State

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street. Price fifty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with the National Bank of Republic, they to notify me by wire. R. A. Rowan.' If the Equity Investment Company does not complete the purchase of said property within the time and manner above specified, then this deposit shall be forfeited to the seller as liquidated damages. National Bank of the Republic, by Frank Knox, Pr."

The \$1,000 was, in fact, plaintiff's money, and immediately after the deposit was made the Equity Investment Company assigned and delivered the foregoing writing to the plaintiff. It will be observed that in none of the statements does anything appear respecting the dimensions of the property, but in the writing that was given by the bank to the plaintiff the property is described as being 55 by 165 feet.

Pursuant to the foregoing deposit the defendant company, on the 20th day of September, 1907, by R. A. Rowan, as president, and P. D. Rowan, as secretary, executed and transmitted by mail to said bank at Salt Lake City a warranty deed by which it conveyed and warranted to the Equity Investment Company 53½ by 165 feet, and in said deed also quitclaimed all right, title, and interest in and to a strip 1½ by 165 feet adjoining the 53½ by 165 feet aforesaid. On the day before the option expired the plaintiff tendered to the bank the sum of \$29,000, being the balance due on the option, and demanded a deed for the property described in the writing he had received from the bank, namely, 55 by 165 feet. The bank, however, tendered plaintiff the deed executed by the defendant as aforesaid, which the plaintiff refused to accept, and demanded a warranty deed for the full 55 by 165 feet, and refused to pay the \$29,000 unless and until he should receive such a deed. A deed as requested by plaintiff was, however, refused by the defendant company, and hence this action to recover back the \$1,000 deposited as before stated.

On the first appeal the judgment in favor of the plaintiff was reversed upon the ground that the district court had erred in submitting to the jury the question of whether the writing

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issued by the bank was authorized or ratified by the defendant company in the absence of any evidence to support such an issue. It was, however, also held on that appeal that, inasmuch as the plaintiff sought a recovery upon the writing issued by the bank, which was issued by it without authority and without evidence of ratification, he could not recover upon the contract evidenced by letters and telegrams. On the second appeal the judgment in favor of the plaintiff was reversed upon two grounds: (1) That the district court erred in refusing to submit to the jury the question of whether the minds of the parties had met upon the quantity of ground that was included in the telegrams; and (2) that the court had erred in requiring R. A. Rowan to answer certain questions on cross-examination. The latter objection is, however, entirely eliminated from this appeal. In the opinion on the second appeal the grounds are fully discussed, and, to avoid all controversy respecting what was decided, and the grounds upon which that decision is based, we append the following excerpts from the opinion:

“A point is made that there is no evidence to show that R. A. Rowan, in sending the telegram, or in anything that he did, acted for the defendant, or that the \$1,000 which was paid to the bank was deposited to the credit of the defendant, or for its benefit, or that it received the money, it, in such respect being contended that Rowan acted for himself, and that the money was deposited to his credit and for his benefit. While everything was done in the name of R. A. Rowan, except the making of the deed, which was in the defendant's name, still there is sufficient evidence to justify findings that Rowan acted for the defendant, and that it received the money deposited in the bank. At any rate, the defendant, by making and forwarding the deed to the bank, ratified the transaction to convey whatever west side State street property was owned by it, upon payments being made as specified in the telegrams. The serious question is: What contract in such respect was made? As has been seen, we on the former trial, held that neither Rowan nor the defendant authorized the bank to make a contract to convey 55x165 feet by warranty, or to make any agreement with respect to the terms of the option, or that either ratified the writing which the bank gave in such particular. We also held that the telegrams which passed between Thomas E. Rowan and R. A. Rowan evidenced the terms of the option. Whether right or wrong, our holding as to that is the law in the case and was binding on a retrial on the same evidence. The evidence as to the bank's authority to give the writing, or as to the defendant's ratification

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thereof, is the same on this as on the other trial. And so was it regarded by the trial court, and for that reason were all questions as to such authority and ratification withheld from the jury. The writing which the bank gave can therefore not be looked to for the terms of the option. For that we must look elsewhere, primarily to the telegrams. In them we have the offer, acceptance, and terms of the option. Everything therein expressed is sufficiently definite and certain, except the description of the property. The description stated in the telegrams is, 'property west side State street.' That, of course, is ambiguous. It was competent to aid the ambiguity by extrinsic evidence, which the parties were permitted to do. The further question is: Was the ambiguity sufficiently aided to ascertain the intention of the parties as expressed by them in the contract? It is clearly enough shown just where the lot is, and that the defendant owned but one lot on the west side of State street. By extrinsic evidence it also is made to appear that the plat in the recorder's office showed the lot to be 55x165 feet. It, however, is just as clearly made to appear by the abstract books and records of deeds that the title which the defendant had by warranty deed was only to 53½ feet and 1½ feet by quitclaim. It also is made to appear that on the 1½ feet stood a wall of an old two-story house adversely possessed and held by another. To aid the ambiguity 'property west side State street,' we do not think the plat in the recorder's office was alone conclusive as to what was intended by the parties. That, of course, was some evidence of their intention, and some evidence as to what they meant by the language 'property west side State street.' But the abstract book and the records of deeds also were evidence for the same purpose. It is not shown that the plaintiff, before he paid the \$1,000, saw the plat in the recorder's office, or the abstract books or records of deeds, or even examined the property to ascertain its frontage, or that he saw Kelsey and Gillespie for information, as was stated in one of the telegrams he could do for 'exact information.' He did see a 'regular real estate man's plat' which showed the property to be 55x165 feet, just as indicated by the plat in the recorder's office. But it is not made to appear that he even saw that before he paid the \$1,000. So far as disclosed by the record, it is not made to appear just what information as to the exact number of feet in the lot the plaintiff had prior to, or at the time of, the payment of the \$1,000, except as recited in the writing given by the bank that the lot was 55x165 feet, and that a warranty deed was to be given for that much ground. Nor is it made to appear from what source the bank got information as to the number of feet of ground to be conveyed or what induced it to give a receipt calling for 55 feet. Certain it is the telegram pointed to by it in its receipt, as authority to accept the money, gave it no such authority, and, indeed, gave it no authority, to make or specify any of the terms of the option to purchase. And we think the bank by the recital of the telegram in *hæc verba*, disclosed just what authority it had, that of a mere depository. After the

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payment of the \$1,000, and when the abstract of the title was examined by plaintiff's counsel, it was discovered that the defendant had title by warranty to only 53½ feet and a quitclaim to 1½ feet. Then it was that he and his counsel visited the premises and found the wall of the house on the 1½ feet. There, however, is evidence to justify a finding that the plaintiff believed and understood that the defendant was to convey 55 feet by warranty deed. That is supported by the bank's receipt, which, while not competent, because unauthorized, to show the terms of the option, nevertheless, as it was seen and relied on by the plaintiff when the \$1,000 was paid, was competent, with other matters, to show how he regarded the ambiguity and understood the contract as to the number of feet which, by its terms, was to be conveyed by warranty. But, since it is not made to appear that the defendant or Rowan, its president, had, prior to plaintiff's refusal of the defendant's tender, knowledge of the terms of the bank's receipt calling for a conveyance of 55 feet by warranty, the receipt was not evidence to show either the terms of the contract or in what sense the defendant understood them with respect to the ambiguity. We also think there is other evidence to justify a finding that the plaintiff, by the ambiguity, believed and understood that 55 feet of ground was to be conveyed by warranty. On the other hand, there is evidence to show that, had he, before he paid the \$1,000, inspected the records to ascertain what 'property west side State street' the defendant had, the exact number of feet which it owned and was capable of conveying by warranty could have been ascertained, and thus he could have known just what the defendant meant by the phrase 'property west side State street.' Thus, when the extrinsic evidence is looked to, the meaning of the ambiguity 'property west side State street' is about as doubtful as it was before.

"Upon the record we deduce these informations: Since the writing given by the bank was neither authorized nor ratified, there is no sufficient evidence to justify a finding that the defendant had agreed to convey 55 feet by warranty, or that it, by the ambiguous phrase, meant or intended to convey any other or different property than was owned and tendered by it. Hence the court erred in submitting the case to the jury on the theory that the defendant had agreed to convey 55 feet by warranty and in binding the jury as was done, that to render a verdict for the plaintiff the jury was required to find that the defendant had agreed to convey 55 feet by warranty. As to the plaintiff's understanding of the ambiguity, and in what sense he regarded the contract, there are two views. One is that he understood and regarded it in the sense that the defendant understood it and as tendering by its conveyance whatever property was owned by it on the west side of State street. If so, then the minds of the parties met; then did the defendant tender a deed in accordance with the agreement; and then was there no breach and no obligation to return the \$1,000. The other view is that the plaintiff understood the ambiguity to mean a conveyance by warranty of 55 feet. If so, then

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the minds of the parties did not meet; then was there no contract; and then was the plaintiff entitled to a return of the \$1,000 paid by him, not on the theory of any breach of contract, but of money had and received. And for that reason was the defendant not entitled to a direction of a verdict. On such view—the view that the minds of the parties had not met as to what was agreed to be sold and conveyed, and therefore, if the jury so found the facts, the plaintiff was entitled to a return of the \$1,000—the plaintiff asked to go to the jury; and, as appears by his requests, that was the only view on which he asked a submission of the case. The court refused the requests or to submit the case on such theory, but, as has been seen, submitted it on the theory alone of whether the parties, independently of the recitals in the bank's receipt, and especially as evidenced by the telegrams, had entered into an agreement to convey 55 feet by warranty, or only 53½ feet by warranty and 1½ feet by quitclaim. Notwithstanding there are no cross-assignments, and no request or motion in the court below on behalf of the plaintiff to direct a verdict in his favor, he nevertheless, in defense of the verdict and judgment, urges an affirmance, on the theory embodied in his refused requests. Since this is a law case in which our power to review, except jurisdictional matters, is restricted to assignments of error, and where we may not, as in equity, look into the evidence to determine the correctness of the judgment, and as there was no motion nor request to direct a verdict in plaintiff's favor, nor even any assignment presenting the rulings refusing his request, our power to affirm the judgment on the theory of money had and received is doubtful, even though on a review of the evidence it should appear that such a direction, had it been asked, would have been justified. But looking into the record as we have, we, as already indicated, are of the opinion that the evidence is not so conclusive as to have entitled the plaintiff to such a direction had such a request been asked or motion made. So too, apparently, was the case regarded by the plaintiff himself, and hence asked for no such direction as matter of law, but for a submission as matter of fact. Thus is it apparent that to now affirm the judgment on the theory urged would be to infringe upon the right to trial by jury and to uphold the judgment upon a wholly different theory from that on which the case was submitted. The judgment therefore must be reversed, and the case again remanded for a new trial."

Upon the last trial the district court submitted the issue to the jury as suggested in the foregoing opinion, and the jury found that issue in favor of the plaintiff. The jury having found that the minds of the parties did not meet upon the question of the number of feet that were included in the telegrams referred to, the defendant company, as suggested in the opinion on the second appeal, had no right to retain plaintiff's \$1,000. Notwithstanding

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that issue has finally been settled by the jury in plaintiff's favor, the defendant, on its present appeal, nevertheless, again presents all the questions argued on the former appeals, with others added. Barring the assignments relating to the admission and exclusion of evidence, and a few other unimportant ones, all the questions now argued have been disposed of on the two former appeals, and no good purpose could be subserved in rearguing those questions here. If, as the jury found, the minds of the parties did not meet upon some essential elements, then it must follow that no contract was entered into by the parties, and hence the defendant retains the \$1,000 of plaintiff's money without right or authority of law. That is practically all that is left of this case.

The court fully and fairly submitted all questions of fact to the jury, and, in view that four juries (the first verdict was set aside by the trial court) have now passed on the facts, and all have found in favor of the plaintiff, 2 the litigation should not be prolonged unless the defendant has been prejudiced in some substantial right during the progress of the trial or in the submission of the case to the jury. It is, however, due to defendant's counsel to say that many of their assignments, and a large part of their argument, are based upon the theory that there was an enforceable contract or agreement entered into between the parties. In view that such theory is not the correct one, the exceptions to the instructions and the assignments relating to the refusal of the court to charge as requested are without merit.

Nor are the assignments relating to the admission and exclusion of evidence meritorious. Without going into further detail, it must suffice to say that a careful examination of the record discloses nothing which would authorize us to interfere with the judgment in favor of the plaintiff a third time.

The judgment is therefore affirmed, with costs to the plaintiff.

McCARTY and CORFMAN, JJ., concur.

WHEELWRIGHT v. ROMAN

No. 2996. Decided May 8, 1917. (165 Pac., 513.)

1. **TRUSTS—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER.** Where a wife held title to property real and personal of which her husband was the sole owner, part of which had been inherited by the husband and conveyed to the wife, and part of which had been purchased with his money and title taken in her name, for business convenience and for lawful purposes, and the wife by unequivocal acts and conduct clearly indicated that she always recognized the rights of her husband and that the equitable title to the property was in him and made deeds to him of such property, the property was held by her in trust for the husband. (Page 14.)
2. **TRUSTS—RESULTING TRUSTS—HUSBAND'S PROPERTY HELD BY WIFE.** Where a wife held title to the sole property real and personal of her husband in trust for his benefit and made deeds and assignments of mortgages to the husband which were not registered and of which she retained possession, and all members of the family including a daughter, who delivered such deeds and assignments to the husband after the death of the wife, understood that the property was held for the sole benefit of the husband, whether or not the deeds were sufficiently delivered at time of execution, the property after her death belonged to the husband. (Page 16.)
3. **APPEAL AND ERROR—JUDGMENTS APPEALABLE.** A decree ordering a defendant to deliver to administratrix property real and personal conveyed to him by the intestate and account to her for the interest he may have collected on the notes, mortgages, etc., was a final and appealable judgment, since the provision for an accounting did not affect the finality of the judgment. (Page 21.)
4. **JUDGMENT—PRAYER FOR GENERAL RELIEF—RELIEF AWARDED.** Where a husband was sued by the administratrix of his wife for property conveyed to him by instruments executed by intestate of which he received possession after her death, although the answer contained a prayer for general relief only, defendant was entitled to such specific relief as the pleadings and the evidence authorized. (Page 21.)
5. **APPEAL AND ERROR—REVIEW—DISPOSITION OF CAUSE.** Where it was more convenient to make and enter conclusions of law and judgment in the district court, the Supreme Court will do no more than indicate and direct what the findings, conclusions of law, and judgments shall be, and remand. (Page 22.)

Appeal from Weber County, Second District

Appeal from District Court, Second District; *Hon. N J. Harris*, Judge.

Action by Mary M. Wheelwright, as administratrix of the estate of Gertrude Roman, deceased, against Daniel B. Roman.

Judgment for plaintiff. Defendant appeals.

REVERSED and REMANDED, with directions.

Joseph Chez for appellant.

Geo. Halverson & A. E. Pratt for respondent.

FRICK, C. J.

The plaintiff, as the administratrix of the estate of Gertrude Roman, deceased, brought this action in equity against the defendant. The purpose of the action was to require the defendant to assign to the plaintiff, as administratrix of said estate, certain notes and mortgages which she alleged were the property of the deceased at the time of her death; to require him to account for the interest he collected on said notes and mortgages; to cancel the deeds to certain real estate, which were made by the deceased in her lifetime, in which the latter conveyed to the defendant the real estate therein described, and which plaintiff alleged, in her complaint, were not delivered to, but were wrongfully obtained by, the defendant; and that such real estate be declared the property of said estate. Plaintiff also prayed for general relief.

The defendant, in his answer to the complaint, set forth the facts concerning the ownership of said real estate and said notes and mortgages in detail. He, among other things, in substance alleged that the title to the real estate described in said deeds was placed in the name of the deceased for a special purpose, and that she held the same in trust for his use and benefit; that the notes and mortgages mentioned in the complaint were made in the name of the deceased for convenience merely, and all of said notes, and mortgages were duly assigned to the defendant by said deceased during her lifetime; that the deceased in her lifetime also made the deeds to the real estate referred to in the complaint and delivered the same

to the defendant. He also specially alleged that he furnished the whole consideration or purchase price for the real estate described in said deeds and for the notes and mortgages described in the complaint, and that the deceased held all of said notes and mortgages, together with said real estate, in trust for the defendant and for his use and benefit. The defendant prayed judgment that the plaintiff take nothing by her complaint, and for general relief.

The pleadings are very long and go into great detail with respect to the transactions involved, but we think the foregoing, when supplemented by the statement of facts which follows, will sufficiently indicate the nature and purpose of the action and the defenses set up by the defendant, and also sufficiently indicate the issues involved.

There is little, if any, conflict in the evidence, and the questions to be determined are largely questions of law rather than fact.

The substance of the evidence is to the effect that Gertrude Roman, the deceased, was the wife of the defendant; that she died intestate in Weber County, Utah, on May 1, 1910; that the plaintiff was appointed administratrix of the decedent's estate on December 8, 1913; that this action was commenced September 1, 1914; that the deceased and the defendant lived together as husband and wife for many years and had reared a family of six children, five of whom were living at the time of trial in Ogden City, Utah; that in June, 1888, the father of the defendant before the former's death conveyed to the latter by warranty deed a portion of the real estate described in the complaint; that the defendant, thereafter, in 1889, sold a part of said real estate, and thereafter, with the proceeds thereof, purchased other parcels of the real estate described in the complaint; that in October, 1896, the defendant, without consideration, conveyed a part of the property which was conveyed to him by his father to the deceased; that in August, 1894, the defendant purchased, with his own money, other parcels of the real estate described in the complaint, all of which were also conveyed to the deceased without consideration as aforesaid; that thereafter, on the 13th day of May, 1899, the

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deceased made certain deeds in which she conveyed all of the foregoing real estate to the defendant, and said deeds were made to avoid the expenses of administration; that no manual delivery of said deeds was ever made to him, but the deceased continued in possession thereof during all of the time from May, 1899, to the time of her death in 1910; that after her death one of the daughters of the deceased and the defendant delivered said deeds to the defendant, and he then had them recorded in the records of Weber County; that during the period from about 1893 or 1894, up to the time of the death of the decedent, the defendant had loaned considerable money to citizens of Ogden; that he could not read or write, except to write his own name; that the deceased, upon the other hand, could read and write readily, and all of the notes and mortgages, amounting to \$9,500, were taken in her name because she was more capable of transacting the business than was the defendant; that all of the notes and mortgages described in the complaint were made as aforesaid, and the deceased during her lifetime made assignments of all of them, but said notes and mortgages, together with the assignments thereof, were all in her possession at the time of her death; that the whole of the money represented by the notes and mortgages in question, as well as the consideration for all of the real estate described in the complaint, was the money of the defendant, and the deceased did not contribute anything except her services as aforesaid; that the deceased, on numerous occasions, and to divers persons, declared that the real estate and the notes and mortgages in question belonged to her husband, the defendant, and that she held the title thereof for business reasons, or for convenience merely.

The foregoing is a mere outline of the principal facts, and, to avoid repetition, we shall, in the course of the opinion, refer to some other matters more in detail.

A trial to the court resulted in findings of fact and conclusions of law in favor of the plaintiff. The court entered judgment declaring that the deceased was the owner of all of said real estate at the time of her death, that at said time she also was the owner of all of the notes and mortgages, and

that the defendant surrender all of said notes and mortgages to the plaintiff, as the administratrix of said estate, and to account to her for any interest he had theretofore collected and for the rents and profits derived by him from said real estate since the death of the decedent. The defendant appeals from the judgment. In his assignments he assails the findings of fact as being contrary to the undisputed evidence and insists that the conclusions of law and judgment are contrary to law.

Counsel for the defendant, in their brief, with much vigor, contend that, notwithstanding the fact that the deeds to the real estate in question and the assignments of the 1 mortgages described in the complaint were in the possession of the deceased at the time of her death, yet they all were intended to be, and were as a matter of law, delivered to the defendant, and that he was lawfully possessed thereof, and that the equitable, as well as the legal, title to all of said real estate, as well as the said notes and mortgages, was in the defendant at the time of his wife's death, and the same always was, and now is, his property. Counsel cite many cases in which they contend it is held that, under facts substantially like those in this case, the delivery of the instruments there in question was sufficient in law. Among other cases that they cite and rely on are the following: *Walker v. Green*, 23 Colo. App. 154, 128 Pac. 855; *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. Rep. 924; *Gage v. Gage*, 36 Mich. 229; *Newton v. Bealer*, 41 Iowa, 334; *Somers v. Pumphrey*, 24 Ind. 239-240; *Dukes v. Spangler*, 35 Ohio St. 119; *Stone v. Duvall*, 77 Ill. 475; *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4; *Dyer v. Skadan*, 128 Mich. 348, 87 N. W. 277, 92 Am. St. Rep. 461. While in at least some of the foregoing cases, under facts and circumstances in many respects similar or analogous to those in the case at bar, the appellate courts sustained the findings of the trial courts that the instruments there in question were intended to be and were delivered, yet it must be conceded that, while the facts and circumstances in the case at bar indicate a clear intention on the part of the deceased to vest the title and ownership of all the property in question

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in the defendant, the evidence is also clear that, so far as the deeds to the real estate are concerned, there never was an actual or manual delivery of them to the defendant until after the death of the deceased. In view that the undisputed facts and circumstances make the case at bar a border-line case upon the question of delivery, and for the reason, as will hereinafter appear, that those same facts and circumstances leave practically no room for doubt that the deceased held the title to all of the real estate as well as to all of the notes and mortgages in question in trust for the defendant, it becomes unnecessary for us to express, and hence we do not express, an opinion upon the question of whether the acts and conduct of the deceased constituted a delivery of the deeds and notes and the assignments thereof to the defendant.

We therefore proceed to a consideration of whether the deceased held the property in question in this case in trust for the use and benefit of her husband, the defendant. Upon that question, the evidence, as before stated, is practically undisputed that the defendant was the sole owner of all the property in question, and that the title to the real estate was placed in the name of the deceased for convenience and for lawful purposes. What is true with respect to the real estate is likewise true with respect to the notes and mortgages. Again, the unequivocal acts and conduct of the deceased clearly indicate that she always recognized the rights of the defendant, and that the title to the property, that is, the beneficial or equitable title, was in him. The mere fact that she made the deeds by which she conveyed the real estate to her husband, and that she made all of the assignments of the notes and mortgages, although not delivered, nevertheless constitutes strong evidence that she constantly recognized the fact that the property was not her own. Plaintiff's counsel, however, point to the fact that there is ample evidence to show that the deeds and assignments were made for the purpose of avoiding the trouble and expense of administering upon the decedent's estate. A sufficient answer to that contention, however, is that, if that had been the purpose of the deceased, why was the whole of the real estate conveyed and all of the notes and

mortgages assigned to the husband of the deceased, the defendant? Administration of the estate could just as well have been avoided by conveying the real estate and by assigning the notes and mortgages to her husband and their children in the proportions she desired to have them divided among them, as to convey all of the real estate and all of the notes and mortgages to her husband, the defendant. The fact, if it be a fact, however, that the deeds were made for the purpose of avoiding the expense incident to administering the estate, in no way either affects or weakens the controlling fact that the deceased held the title to all of the property in question in trust for the defendant.

When the foregoing circumstances are considered in the light of the numerous declarations of the deceased during her lifetime, and up to within a short time of her death, then, as we before stated, there is little, if any, room to doubt that she held all of the property in question in trust for her husband. One witness, in referring to the declarations of the deceased concerning the real estate in question (quoting from the bill of exceptions), in part testified:

"She [the deceased] said the property was all Mr. Roman's, he inherited it from his father, and she didn't have anything to say without Mr. Roman's consent, she was merely a business man, that is, understood the business better than he did, and consequently she attended to the business, and she had some of her property in her name on that account, because she was attending to his business and he didn't read or write very good, and she understood it, and it was much better in her name than it would be in his, that is, to transact business, but that was his property, because he wouldn't sell it, he said he was going to keep it for his sons."

In referring to the other parcel of real estate included in the deeds referred to in the complaint, the witness testified:

"The property here in town, she [the deceased] told me it belonged to Mr. David Roman, that is, Mr. Roman's father, and just prior to his death he deeded it to him the [defendant]."

The witness further said:

"She told me that the place in town belonged to her husband, that they would come and live in town if they would sell the farm—they called that their home, and they would sell the farm and live in town, but Mr. Roman objected on account of having three or four boys. He wanted to save it for the boys."

Another witness, who transacted business for the deceased, testified that, in referring to the money that was being loaned, and which is represented by the notes and mortgages in question, the deceased said:

"The money we are placing out is my husband's money—my husband's money which I am placing out in my name."

The witness testified "that was the sum and substance of the conversation" he had with the deceased. The same witness testified that the assignments of the note and mortgages were all made in accordance with "her instructions."

Another witness testified that the deceased, in referring to the making of the loans, said: "She done the business; she said she done the business for Roman," the defendant.

Some time before her death, the deceased exhibited all of the notes and mortgages, together with the assignments thereof, and the deeds to the real estate in question, to one of her daughters, and the daughter testified that her mother then said:

"Come here. I want to show you these papers. I want you to know how I fix these, and I am going to have all of them fixed. In case anything happens to me, you can always carry on the business with papa."

The same witness and one or two others also testified that the deceased told them that she wanted the daughter to transact the business for her father the same as the deceased had been transacting it in the past.

There were other witnesses who testified to other declarations of the deceased by which she clearly and unequivocally indicated that she at no time claimed ownership of the property in question, or any part of it, and that she always regarded it as her husband's property, and that all of it was placed in her name for convenience and for legitimate and lawful

purposes, and that she held the title thereof for his use and benefit. Indeed, the whole trend of the evidence, that is, the great weight and effect thereof, is as above indicated. It should also be remembered that the deceased was suddenly stricken with paralysis, and, while she lingered for some days, yet she never regained consciousness after she was stricken, and died in an unconscious condition. She was thus prevented from giving any directions or making any disposition of the property in question other than she had made.

The testimony of the several witnesses respecting the declarations and statements made by the deceased is not disputed: Counsel for defendant insist that, under the undisputed facts and circumstances, it was the duty of the trial court to declare, as a matter of law, that the deceased held all of the property in question in trust for the defendant. Counsel cite and rely upon the following, among other, cases in support of their contention: *Taylor v. Morris*, 163 Cal. 717, 127 Pac. 66; *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308; *Cooney v. Glynn*, 157 Cal. 587, 108 Pac. 506; *Silvey v. Hodgdon*, 52 Cal. 363; *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; *Culp v. Price*, 107 Iowa, 133, 77 N. W. 848; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Bailey v. Dobbins*, 67 Neb. 548, 93 N. W. 687; *Akin v. Akin*, 268 Ill. 324, 109 N. E. 268; *Endsley v. Taylor*, 143 Ga. 607, 85 S. E. 852; *Leroy v. Norton*, 49 Colo. 490, 113 Pac. 529; *Dieckman v. Merkh*, 20 Cal. App. 605, 130 Pac. 27; *Odell v. Moss*, 137 Cal. 542, 70 Pac. 547. In some of the foregoing cases the question arose as between husband and wife; in others, between father and child; and, in others still, between brother and sister. The evidence respecting the trust in each one of the foregoing cases was much less convincing than is the evidence upon that question in the case at bar. In view of the importance of the question involved, we shall take the liberty of quoting from a few of the foregoing cases.

In *Cooney v. Glynn*, supra, in the course of the opinion the law is stated thus:

“It has been established by a number of decisions in this state that where confidential relations exist between two parties, and one of them executes a conveyance of real estate to the other, upon a parol promise

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by the other that he will hold it for the benefit of the grantor, or for the benefit of some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated."

In *Bailey v. Dobbins*, supra, the Supreme Court of Nebraska states the rule in the following words:

"Generally speaking, where the purchase money of land is paid by one person, and the title is taken in the name of another, the party taking the title is presumed to hold it in trust for him who pays the purchase price. The reason given for this rule is that the party who pays the money is presumed to intend to become the owner of the property, and the beneficial title follows such intention. This presumption, however, does not arise where the legal title is taken in the name of some person for whom the purchaser is under a legal or moral obligation to provide. In such case, the presumption arises that the conveyance was intended as an advancement to the nominal purchaser. The foregoing will be recognized as elementary. Whether the conveyance be to a stranger, or to one for whom the purchaser is bound to provide, the presumption arising therefrom is not of law, but of fact, which may be rebutted by evidence tending to show that the intention of the purchaser was different from that to be inferred from the bare fact of such conveyance. This, also, is elementary. Hence, in either case, when it appears that the purchase money has been paid by one person, and the title taken in the name of another, the question is whether it was intended that the one to whom the conveyance was made should take the entire estate, or that the one paying the purchase price should hold the equitable title to the property. When the intention in that behalf is ascertained, the courts will give it effect, if possible."

In *Dorman v. Dorman*, supra, the law is stated in the head-notes in 58 N. E. 235, thus:

"Where a husband purchases land, and takes the deed therefor in the name of his wife, the burden of proof to establish a resulting trust in his favor as against her heirs, and to rebut the presumption that such conveyance was intended as an advancement to the wife, is on the husband.

"A husband purchased land, and paid the consideration therefor, but took the deed in the name of his wife. He made permanent improvements on the land, paid the taxes, and exercised complete control over it, and he and the wife occupied the premises for a time. The land constituted the principal part of his estate, and he had a family of small children. The wife had said that the land was deeded to her in trust for

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the husband. Held sufficient to show a resulting trust therein in favor of the husband."

It is also made clear in the foregoing cases that there is little, if any, room for the presumption insisted on by plaintiff's counsel that the property in question was transferred to the deceased as an advancement. Indeed, all the facts and circumstances in the case at bar rebut such a presumption.

We thus have a case where all the property in question was clearly shown to have been the sole property of the defendant; where the reason why it was held in the name of the deceased is clear and reasonable; where the deceased, during her lifetime and during a long period of years, many times declared the true origin of her title, and that the property was not hers, and that she held the title thereto merely as a matter of convenience for the use and benefit of the defendant, her husband; where the acts and conduct of the deceased in making the deeds to the real estate and the assignments of the notes and mortgages, when viewed in the light of her declarations, clearly indicate that she never did claim, or intended to claim, the property, or any of it, as her own, but always regarded it as the property of her husband, the defendant. The daughter who delivered the deeds and the assignments of the mortgages to her father after the mother's death also clearly understood that she was merely effectuating the well-grounded and long-continued purposes of her mother, the deceased. It would seem that all of the other members of the family must have joined in the conclusions of the daughter just referred to, in view that no application for administration was made until more than 3½ years after the mother's death and that this action was not commenced for nearly a year after plaintiff was appointed administratrix of the mother's estate. Nor, in view that the true condition of things was known by all concerned, was there any reason for the delay aforesaid. The defendant has now reached the age of upwards of seventy years. So far as the record discloses, he has no other property than the property in question. The evidence also shows that, although the defendant had no education, yet he is possessed of a natural instinct and ability to make money, and that it was largely, if not entirely, due to his efforts that the property in question

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was accumulated. Under the undisputed facts and circumstances, therefore, it would be a reproach both to the courts and to the law if, in his old age, he could be deprived of the use of his own property, and would be required to stand by and see his estate administered during his lifetime by another. Of what use are constitutional guaranties respecting the rights of property, if they may be disregarded by the courts?

In our opinion, the district court committed manifest error in holding that the property in question was the property of the deceased at any time, and especially at the time of her death, and in refusing to enforce the trust.

Plaintiff's counsel further contend that, in view that the judgment requires an accounting to be made 3 by the defendant, for that reason the judgment is not final, and hence not appealable. The contention is not tenable. What is required from the defendant is a part of the final judgment. The defendant appeals from that part, as well as from all other parts. The judgment is not interlocutory, but is final and conclusive respecting all matters covered thereby. The mere fact that the defendant is ordered to deliver the property to the plaintiff and to account to her for the interest that he may have collected on the notes and mortgages, etc., does not affect the finality of the judgment. If authority be required upon a proposition as elementary as the one now under consideration, the following cases will be found directly in point: *Johnson v. Northern Trust Co.*, 184 Ill. App. 549; *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537; *McMurray v. Day*, 70 Iowa, 671, 28 N. W. 476; *Adams v. Sayre*, 76 Ala. 509.

Finally, the question arises whether the defendant can be given proper relief, in view that general relief is prayed for in the answer without praying for the specific 4 relief, to which, in view of the foregoing opinion, he is entitled. That, in case general relief only is asked, any relief that is supported by the pleadings, and the evidence may be granted, is well settled. In *Rollins v. Forbes*, 10 Cal. 299, the rule is stated thus:

"If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief."

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To the same effect are *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473; *Davis v. Davis*, 9 Mont. 267, 23 Pac. 715; *Kleinschmidt v. Steele*, 15 Mont. 181, 38 Pac. 827; 1 Suth. Code Pl. & Pr. 111.

In view that it is more convenient to make and enter conclusions of law and judgment in the district court, we shall do no more than indicate and direct what the findings, conclusions of law, and judgment shall be. 5

The findings of fact and conclusions of law, so far as inconsistent with this opinion, are set aside, and the judgment reversed. The cause is remanded to the district court, with directions to make findings of fact and conclusions of law in conformity with the views expressed in this opinion, and to enter judgment requiring the plaintiff, as administratrix of the estate of Gertrude Roman, deceased, to execute and deliver to the defendant a proper deed of conveyance to all of the real estate described in the complaint that is in controversy in this action, and, in case said administratrix refuses to make such a conveyance, to direct that the judgment or decree entered shall constitute such conveyance; that the court adjudicate and declare the title to said real estate to be in the defendant and that he is the owner thereof, and that the title thereto be quieted in him; that the defendant be declared to be the sole owner of all the notes and mortgages in controversy; and that the administratrix also be required to execute and to deliver to the defendant proper and sufficient assignments to all of the notes and mortgages aforesaid.

It is further ordered that, in case there are sufficient assets in said estate, the costs and expenses of this appeal be by the district court ordered to be paid out of said estate, and, if there are no assets in said estate, then it is ordered that neither party to this appeal recover costs.

McCARTY and CORFMAN, JJ., concur.

Appeal from Tooele County, Third District

TANNER v. JOHNSON

No. 2992. Decided May 8, 1917. (165 Pac., 466.)

1. **CONTRACTS—BREACH OF CONTRACT TO THRESH GRAIN—EVIDENCE.** In an action to recover damages for breach of an oral executory agreement under which plaintiff was to thresh defendant's grain, evidence and admissions of pleadings *held* to make a *prima facie* case for plaintiff. (Page 25.)
2. **CONTRACTS—CONTRACT TO THRESH GRAIN—RIGHT TO TERMINATE.** That defendant had notified plaintiff of the termination of contract before the time fixed for its performance did not preclude recovery.¹ (Page 25.)
3. **DAMAGES—RENUNCIATION OF CONTRACT TO THRESH GRAIN.** The measure of damages for renunciation of a contract to thresh grain was the net profit thresher would have realized had he been permitted to do the threshing. (Page 25.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by J. J. Tanner against Henry Johnson.

From a judgment of nonsuit and from an order denying his motion for a new trial, plaintiff appeals.

REMANDED, with directions to grant a new trial.

Evans, Evans & Folland for appellant.

L. L. Baker and W. S. Marks for respondent.

CORFMAN, J.

Plaintiff brought this action against the defendant in the district court of Tooele county to recover damages alleged to have been sustained because of the renunciation of an oral executory agreement. Briefly stated, the complaint alleges that an agreement was entered into between the plaintiff and the defendant whereby the defendant employed the plaintiff to thresh the grain raised upon defendant's farm for the season of 1915; that the grain was to be threshed on or about October

¹ *Holland-Cook Mfg. Co. v. Con. W. & M. Co.*, 49 Utah, 43, 161 Pac. 922.

1, 1915, in consideration of which the defendant was to pay to plaintiff a reasonable toll of $8\frac{1}{2}$ bushels for each 100 bushels or fraction thereof threshed; that on or about the 14th day of September, 1915, the defendant repudiated the contract thus entered into, to plaintiff's damage in the sum of \$300, for which sum plaintiff prayed judgment and costs.

The answer, in substance, admits the agreement, and affirmatively alleges that plaintiff represented to defendant he would thresh his grain in a first-class manner, and with a machine that would do first-class work so that there would be little, if any, loss, and that the grain would be threshed at the agreed time without unnecessary delay; that defendant canceled and terminated the contract on or about September 10, 1915, on receiving information from various sources that the machine with which plaintiff intended to do the threshing did not do satisfactory work, in that it did not thresh grain clean, and that large losses were being sustained by various persons for whom plaintiff had threshed and was threshing; that great delays were continually occurring which caused great expense and annoyance for any person for whom plaintiff attempted to thresh grain; and that plaintiff sustained no loss whatever by reason of defendant not permitting plaintiff to thresh his grain.

At the trial, which was to the court without a jury, the defendant, in brief, testified, when called as a witness for the plaintiff, that he employed plaintiff to thresh the grain raised in 1915, and afterwards canceled the employment; that the grain raised by him in 1915 was threshed by another than the plaintiff, and that the value of the toll for the threshing would have amounted to \$194 at the price fixed under his agreement with plaintiff; that it was the understanding that if the plaintiff was to do the threshing he was also to do the threshing for others in the vicinity; that plaintiff threshed for defendant in 1914, and had inquired how the defendant liked the job. "I told him it was very good. He then asked me, he says, 'Could I have your threshing for 1915.' I said, 'Yes; if your job is as good as it has been this year you can have it.' "

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The plaintiff testified in his own behalf that the net profit to him would have amounted to \$122, and that there was no understanding between him and the defendant that he was to do the threshing for others in the vicinity.

At the conclusion of plaintiff's evidence a nonsuit was granted on the application of the defendant. A motion for a new trial was made and denied. Plaintiff appeals.

The only question for this court to determine is whether the plaintiff, when he rested at the trial, had under the admissions of the pleadings and the evidence, established a prima facie case. It is to be observed that the answer of the defendant admits the contract sued upon with some slight 1 qualifications; that while it was still in force and effect he "canceled and terminated" it before performance "believing" that the plaintiff's machine would not do satisfactory work; and that prior to the date plaintiff was to have threshed the grain the former notified the latter that he would not permit him to thresh the grain. It is also to be observed from the record that the plaintiff's evidence clearly established the value of the tolls for the threshing of defendant's grain for the season covered by the contract at the contract price agreed upon between plaintiff and the defendant to be \$194, and that the plaintiff's net profit, after deducting the expenses of doing the threshing, would have amounted to \$122.

It is contended by the defendant that the contract in question was purely an executory contract subject to termination at any time by either party, and because of the defendant having notified the plaintiff of its termination before the time fixed by its terms for performance the plaintiff 2, 3 was precluded from recovering in his suit for damages. With this contention we cannot agree. We think the plaintiff's proof, coupled with the expressed admissions of the defendant's answer in the case, absolutely preclude a judgment of nonsuit. The plaintiff here sued to recover damages for breach of an executory contract. The theory on which the case was tried, and what was clearly established by the plaintiff's evidence, when defendant interposed a motion for nonsuit, was that the plaintiff had sustained a net loss of \$122,

after deducting all legitimate expenses, by reason of the defendant's refusing to permit the plaintiff to perform the contract. The rule of law applicable in such cases, as laid down by all the text-writers and clearly established by the adjudicated cases, may be best stated in the language of 1 Suth. Dam. 66, cited in plaintiff's brief, as follows:

"Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at the contract price and is prevented from earning this profit by the wrongful act of another party, its loss is a direct and natural result which the law will presume to follow the breach of the contract; and he is entitled to recover it without special allegations in his declaration; the amount of damage may be established by showing how much less than the contract price it will cost to do the work or to perform the contract."

The authorities cited by defendant in his brief (*Davis & Rankin v. Bronson*, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; *Danforth v. Walker*, 37 Vt. 239; *Moline Scale Co. v. Beed*, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; and *Thomas v. Clayton Piano Co.*, 47 Utah, 91, 151 Pac. 543) are not in point. These cases simply hold that under an executory contract one party has the power to stop performance by subjecting himself to the payment of such damages as will compensate the other party for being stopped in the performance on his part, the same theory under which the plaintiff was seeking to recover from the defendant in the case at bar when defendant's motion for nonsuit was interposed. In the Utah case above mentioned the cases cited by defendant herein were referred to. In that case the plaintiff sought to recover from the defendant the full stipulated contract price after notice of repudiation, and this court, speaking through Mr. Justice Frick, said:

"But where, as here, it is made to appear that the contract was renounced before the time for performance had arrived, the plaintiff cannot sue upon the theory that he had fully performed, and is therefore entitled to recover the amount stipulated in the contract. Ordinarily, under such circumstances, the plaintiff can only recover the damages he suffered by reason of the renunciation of the contract up to time of notice of renunciation. * * * It is true that the damages may equal the amount stipulated in the contract under certain circumstances."

Again in a late case, *Holland-Cook Mfg. Co. v. Con. W. & M. Co.*, 49 Utah 43, 161 Pac. 922, this doctrine is fully sus-

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tained by this court. In that case suit was brought for the recovery of damages for breach of contract by reason of the defendant refusing to receive three carloads of silos which it had ordered from plaintiff, the defendant having breached the contract by renouncing the same before performance. The opinion in that case says:

“Where, as here, the article contracted for is not in esse, but is to be manufactured, and the purchaser refuses to comply with his contract, the seller is not bound to manufacture the article and tender it to the purchaser, but he may sue the purchaser for damages for breach of contract, and the measure of damages and of his recovery is the difference, if any, between the cost of manufacturing the article or property purchased and the price agreed to be paid therefor by the purchaser; in other words, the profits that the seller would have derived from the contract in case the purchaser had fully performed the same is the measure of damages.”

We are therefore of the opinion that the contention of the plaintiff that the trial court committed error in entering a judgment of dismissal of plaintiff's case on motion of defendant for nonsuit is fully sustained under the authorities and the record here, and that the case should be remanded to the district court of Tooele county, with directions to grant a new trial.

It is so ordered; appellant to recover costs.

FRICK, C. J., and McCARTY, J., concur.

SMITH v. BROWN

No. 3030. Decided May 8, 1917. (165 Pac., 468.)

1. **BILLS AND NOTES—ISSUES, PROOF, AND VARIANCE.** Answer held sufficient to permit proof that note sued on was delivered upon condition, and that there was want and failure of consideration. (Page 31.)
2. **EVIDENCE—CONDITION PRECEDENT TO EXECUTION OF NOTE.** Under the Negotiable Instruments Act (Laws 1899, c. 83), as between original parties, defendant could prove allegations of his answer that note sued on was delivered upon condition. (Page 32.)
3. **BILLS AND NOTES—DEFENSE—WANT OR FAILURE OF CONSIDERATION.** In payee's action on a note, evidence was admissible to substantiate

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answer alleging want and failure of consideration in view of Comp. Laws 1907, section 1580, allowing such defense, as against any person except a holder in due course. (Page 32.)

4. CORPORATIONS—SUBSCRIPTIONS—VALIDITY—PROFITS FROM CORPORATE STOCK. Agreement that plaintiff would look to profits from stock in payment for such stock purchased for himself and defendant in consideration of defendant managing the business was neither illegal nor unreasonable. (Page 33.)
5. BILLS AND NOTES—WANT OF CONSIDERATION. If plaintiff agreed to look to profits of stock in payment for such stock purchased for himself and defendant in consideration that defendant manage the business, he had no personal claim against defendant, and there was no consideration for a note given by defendant to secure such payment. (Page 33.)
6. CONTRACTS—ADDITIONAL AGREEMENT—NECESSITY OF NEW CONSIDERATION. Where a party is already bound to do a particular thing and refuses to perform until the other party enters into a new agreement, the latter is not binding in the absence of a new consideration. (Page 34.)

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action by Charles H. Smith against W. D. Brown.

Judgment for plaintiff. Defendant appeals.

REVERSED and REMANDED, with directions to grant new trial.

Boyd, De Vine & Eccles for appellant.

Jno. E. Bagley for respondent.

FRICK, C. J.

The plaintiff brought this action to recover upon a promissory note. The complaint is in the usual form. The defendant, in his answer to the complaint admitted "the execution" of the note, but denied its delivery, and denied "the indebtedness therein alleged." Among other things, the defendant also averred in his answer that "said note was given without consideration"; that it was given "by reason of the fraudulent representations of the plaintiff," setting forth the circumstances in detail. The defendant also averred that several months prior to the execution of said note the plaintiff, by

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certain promises, induced the defendant to enter into the business of selling and handling grain and other farm products; that to accomplish the plaintiff's purpose in that regard a corporation known as the Western Grain & Brokerage Company was organized; that before said corporation was organized it was agreed that plaintiff would subscribe for 7,500 shares of the capital stock of said corporation of the par value of \$1 each; that 3,750 shares of the said 7,500 shares should be issued in the name of the defendant; that the number of shares was thereafter increased so that both the plaintiff and the defendant each held 3,900 shares of the capital stock of said corporation; that it was agreed that the plaintiff should advance all the money to pay for said capital stock, and that the defendant should manage and conduct the business affairs of said corporation, and that plaintiff was to be repaid the amount advanced by him for said 3,900 shares of defendant's stock out of the first profits derived from said business, and "not otherwise"; that, in addition to the money plaintiff advanced for the stock as aforesaid, he also agreed to furnish such additional funds as might be necessary to carry on the business of said corporation; "that thereafter the plaintiff herein requested of the defendant the execution of some written agreement showing the conditions herein set forth, and under which this defendant accepted and held such stock, and that prior to the execution of the note herein the plaintiff turned over to the defendant, in pursuance of such agreement, all of said stock; that such an agreement was prepared, but never executed, and that after consideration the plaintiff desired and requested that the defendant herein execute a note for the amount, par value, of such stock, together with interest, the same being the note in question, but with the agreement and understanding between the parties hereto at such time that such note would simply be an evidence of the amount to be paid by the defendant from the profits of such business, and that, relying upon said representations of the plaintiff herein, and the further statement at such time by the plaintiff that unless such note was executed so that he would have some evidence of the amount due from the defendant to the plaintiff

that he would not advance further and necessary funds to carry on such business, that, relying upon such representations, and not otherwise, the defendant executed such note; that thereafter the plaintiff absolutely refused to advance sufficient and necessary funds to successfully and properly carry on said business, as agreed upon by all of the parties in interest, and as a result thereof said company become indebted and insolvent, and its affairs were entirely closed up, and that there were not sufficient assets to pay any of the stockholders therein any distributive share or dividend above the indebtedness of said company"; that the defendant, relying on plaintiff's said promises, entered into the business relations aforesaid, and thereafter managed said business and executed said note for the reasons stated, and not otherwise. While the answer contained other averments, yet the foregoing are sufficient to show the nature of the defenses relied on. While the plaintiff filed a reply, yet, under our statute, no reply was either necessary or proper. It is therefore unnecessary to make further reference to the pleadings.

At the trial the defendant assumed the burden of proof and opened the case. When he attempted to establish the averments of his answer by the testimony of the defendant and other witnesses plaintiff's counsel, as appears from the bill of exceptions, interposed the following objection:

"Mr. Bagley: I object to that. I object to it on the grounds that it is immaterial, irrelevant, and incompetent and as an attempt to vary and contradict the terms of a written instrument.

"The Court: Objection sustained."

The defendant duly excepted.

The foregoing objection was interposed and sustained to every question asked by the defendant's counsel and to all offers to prove the averments of the answer made by them. The defendant was thus not permitted to introduce any evidence in support of the averments of his answer, and the court directed the jury to return a verdict in favor of the plaintiff for the amount of the note with accrued interest. Judgment was entered accordingly, and the defendant appeals.

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Defendant's counsel contend that the court committed manifest error in excluding the proffered evidence. They insist that, in view of the averments contained in the answer, they were entitled to show that the note in question was delivered upon an express condition and that it was given without consideration. While the answer is somewhat inartificially drawn and several defenses are intermingled, yet, when the averments contained therein are considered and are given the liberal construction required by our statute, the answer is sufficient to permit the defendant to prove the following state of facts: That long prior to the making of the note the plaintiff had induced the defendant to become a stockholder in a certain corporation which was organized for plaintiff's benefit; that the plaintiff was to subscribe and pay for a certain amount of the capital stock of said corporation, one-half of which was to be issued in the name of the defendant, and the defendant was to manage and conduct the business affairs of said corporation; that the plaintiff was to be repaid the amount he had advanced for the stock issued to the defendant out of the first profits derived from the business of said corporation, and not otherwise; that the plaintiff had also agreed to advance all further sums of money that might be necessary to carry on said business if any was necessary; that he afterwards refused to do so unless the note in question was made; that the note was made and delivered to the plaintiff as evidence of the amount of money he had advanced for the capital stock issued in the name of the defendant and partly because the plaintiff had refused to advance the money he had promised to advance to carry on the business, and which money the plaintiff continued to refuse to advance unless the note was executed by the defendant, and that, after the note was executed, plaintiff nevertheless refused to advance any money, with the consequences set forth in the answer. If, therefore, the jury should have found, as under the issues they might have found, if the evidence supported the averments in the answer, that those were the facts and the conditions upon which the note in question was actually made and delivered,

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we cannot conceive upon what theory the plaintiff should prevail in the action. Certainly not as a matter of law.

Under the Negotiable Instruments Act (Laws 1899, c. 83), which is in force in this state, it is settled beyond controversy that as between the original parties it may always be shown that a promissory note was delivered upon condition, or that it was made without consideration, or that the consideration had failed in whole or in part. In 1 Daniel, Neg. Insts. section 68a, the prevailing rule under the Negotiable Instruments Act is stated thus:

“The conflict of authority on the question whether a bill or note can be shown to have been delivered upon a condition precedent is settled in those states which have adopted the statute, whereunder the rule is recognized that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation in present of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the parties will have no validity as a binding contract till the condition shall have been satisfied.”

The foregoing doctrine has been followed by this court in the very recent case of *Martineau v. Hanson*, 47 Utah, 549, 155 Pac. 432, and cases there cited. In addition to the cases cited in the foregoing opinion, we especially refer to the following as directly in point under the issues presented in defendant's answer: *Oakland Cemetery v. Lakens*, 126 Iowa, 121, 101 N. W. 778, 3 Ann. Cas. 559; *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841. In both of the cases last cited defenses in their nature similar to those set up in defendant's answer were held good as between the parties to the notes there in question. See, also *Julius Kessler & Co. v. Perelius*, 107 Minn. 224, 119 N. W. 1069, 131 Am. St. Rep. 459, and *Union Inv. Co. v. Epley*, 164 Wis. 438, 160 N. W. 175. While the question of conditional delivery is not made as clear as it might be in the answer in this case, yet the question is, to some extent at least, involved, and the defendant had a right to have the jury pass upon the evidence to determine that question.

The question whether there was any consideration for the note in question, or whether there was a failure of consideration in whole or in part, was, however, squarely 3

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presented by the averments contained in the answer. Upon that question our statute, Comp. Laws 1907, section 1580, provides:

“Absence or failure of consideration is matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise.”

Referring again to 1 Daniel, Neg. Insts., in section 193 the author says:

“Under the statute it is competent to show, under a plea of partial or total failure of consideration, that the purchaser was induced to execute the instrument sued on by false and fraudulent representations of the seller as to the quality, quantity, value, or character of the property which formed the consideration that moved the contract, as that is one mode of showing a failure of consideration, and the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and if the party so defrauded be relieved from liability thereon, it has been held that such fraud makes such paper voidable by all the other persons who signed it, though they did not participate in and were ignorant of such fraudulent conduct at the time they signed it.”

Now, under the averments in the answer, it was relevant to prove that in consideration that the defendant should manage and conduct the business of the corporation he was not to become personally liable to the plaintiff for the purchase price of the capital stock issued in defendant's name, and that the plaintiff, in order to compensate himself for the amount he had advanced for that stock, should receive the profits until he was fully repaid the purchase price of that stock. Such an agreement, if entered into, certainly was not illegal nor unreasonable. Every person who subscribes for corporate stock must rely either upon the increase of the par value or price of the stock or on the dividends to be derived from the business as compensation for the money advanced for the stock. 4

If the plaintiff, as averred by the defendant, therefore had agreed to advance the purchase price of the stock in consideration that the defendant should personally manage and conduct the corporate business, and had agreed to look to the profits of the business to compensate himself for the 5

amount of money he had advanced for the stock which was placed in defendant's name, he had no personal claim against the defendant, and there was no consideration as between plaintiff and the defendant for the note in question.

True, defendant has averred in his answer that plaintiff promised to advance additional money to carry on the corporate business, and that he would not advance any unless the defendant executed the note in question, and such advancements, if made, constituted part consideration 6 for the note. We do not know what induced those averments in the answer, since from what had been averred before it was quite clear that there was no consideration for the note. We say this because the averments in the answer are clearly to the effect that plaintiff had promised to advance any further sums of money that might be necessary to conduct the business as a part of the original agreement between the parties. If that were true, then plaintiff was already bound to furnish such an amount of additional money as was reasonably necessary to carry on the business. As a matter of law, therefore, he could not impose new conditions upon the defendant. It is elementary that where a party is already bound to do a particular thing, but refuses to do it until the adverse party enters into a new promise without any additional independent consideration, the latter promise is not binding, since it is without consideration. If it be assumed, however, that the defendant executed the note in consideration that the plaintiff should furnish additional money to carry on the business, yet it is also averred in the answer that the plaintiff utterly refused and failed to comply with that promise. The consideration in that respect, if it constituted such, therefore wholly failed. We may therefore view the transactions set forth in the answer from any angle we wish, and if the facts pleaded are true, the defendant, and not the plaintiff, should prevail. As a matter of course we cannot say whether the facts pleaded are true or not true. All that we now pass on is that the defendant had the right to present the evidence in support of his averments to the jury whose

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province it was to determine whether they were true or not true.

The judgment is therefore reversed, and the cause is remanded to the district court of Weber County, with directions to grant a new trial and to proceed with the case in accordance with the views herein expressed; appellant to recover costs.

McCARTY and CORFMAN, JJ., concur.

FARMERS' & STOCKGROWERS' BANK v. PAHVANT VALLEY LAND CO. et al.

No. 2978. Decided May 8, 1917. (165 Pac., 462.)

1. **BILLS AND NOTES—CONDITIONAL INDORSEMENT—VALIDITY.** Indorsement of a note before delivery to payee may be conditional.¹ (Page 41.)
2. **BILLS AND NOTES—CONDITIONAL INDORSEMENT—VALIDITY.** Where the indorsement of a note before delivery is conditional, such conditions, to be binding upon the payee, must be accepted by him, made with notice to him, or acknowledged on his part before or accompanying delivery (Page 41.)
3. **BILLS AND NOTES—DEFENSES—CONDITIONAL INDORSEMENT—PLEADING AND PROOF.** Where a conditional indorsement is relied on as a defense, the fact that the conditions were accepted by or made with notice to or acknowledged on the part of the payee before or accompanying delivery must be pleaded and proved with common certainty.² (Page 41.)
4. **ALTERATION OF INSTRUMENTS—PLEADING—ANSWER—SUFFICIENCY.** In an action on a note, allegations of the defendant guarantors in their answer that they had signed the note in blank, and that the note had subsequently been altered by means of a stamp by the words, "Notice and protest waived, and for value received payment of the within note guaranteed by," and that such stamp was placed upon the note fraudulently subsequent to the signing without knowledge of such defendants, did not sufficiently state such defense, since it is not alleged when or by whom the alleged wrongful stamping is done, and, in view of the fact that plaintiff specifically alleged interest payments by the defendants since the maturity of the note,

¹ *State Bank of Utah v. Burton-Gardner Co.*, 14 Utah, 420, 48 Pac. 402.

² *Flint v. Nelson and Others*, 10 Utah, 261, 37 Pac. 479; *State Bank of Utah v. Burton-Gardner Co.*, 14 Utah, 420, 48 Pac. 402.

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it was material for the defendants to allege in their answer that the alteration complained of was made not only without defendants' consent or knowledge, but with privity or knowledge on the part of the plaintiff before delivery, and that defendants had not since ratified the alteration. (Page 42.)

5. **ALTERATION OF INSTRUMENTS—EVIDENCE—PRESUMPTIONS.** Where a stamping complained of by defendants as an alteration of a note set forth in plaintiff's complaint appears to be regular on its face, without erasures, interlineations, or improper action indicating that it was not fully authorized, the presumption is that the stamping was properly made on the note before the delivery to the plaintiff. (Page 43.)
6. **ALTERATION OF INSTRUMENTS—RATIFICATION—ACTUAL KNOWLEDGE.** Although a party must have actual knowledge of the alteration of a note before payment to constitute a ratification thereof, where payment is pleaded in the complaint and admitted in the answer without alleging that it was made without defendant's knowledge or consent, ratification is sufficiently implied. (Page 43.)
7. **ALTERATION OF INSTRUMENTS—PLEADING—STATUTE.** The general rule of pleading alteration of a written instrument under the Code requires that, where the instrument is declared upon in its altered form, the answer should be in the form of a general denial of all the material allegations of the complaint, or a specific denial of the execution of the instruments sued on, or a specific statement of the facts relied upon a defense. (Page 44.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by the Farmers' & Stockgrowers' Bank against the Pahvant Valley Land Company and others and Charles A. Welch and others.

From a judgment for plaintiff upon the pleadings, defendants Charles A. Welch and others appeal.

AFFIRMED.

Evans, Evans & Folland, Walton & Walton and *P. H. Neeley* for appellants.

Stewart, Bowman, Morris & Callister for respondents.

APPELLANTS' POINTS.

"It is sufficient to prevent a judgment on the pleadings if the answer presented a single material issue. (25 Cyc. 769;

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11 Ency. Pl. & Pr. 1032-1033; *Widmer v. Martin*, 87 Cal. 88, 25 Pac. 264; *Martin v. Porter*, 84 Cal. 476, 24 Pac. 109; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 763; *Willis v. Holmes*, 28 Ore. 265, 42 Pac. 989)." *Town of Mapleton v. Kelly*, 39 Utah 252, 254. *

Section 2986, C. L. Utah, 1907, provides that: "In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

In the case of *Hancock v. Luke*, 46 Utah, 26, 148, Pac. 453, 455, this statute was construed to mean that:

"Where it is clear, * * , that a denial of particular allegations of the complaint was intended, the mere form of such denial is not always conclusive."

The court also says, (opinion page 455):

"Motions for judgment on the pleadings are not favored by the courts, and upon such a motion the pleadings will be construed with great liberality in favor of the party whose pleadings are assailed. *Bowles v. Doble*, 11 Or. 480; *Currie v. So. Pac. Co.*, 23 Or. 400, 31 Pac. 963; *James River, etc., Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7; *Giles, etc., Co. v. Recamier Mfg. Co.*, 15 N. Y. St. Rep. 354."

Our Statute (C. L. Utah, 1907, Sec. 1616, sub. 1) provides that where a person, not otherwise a party to an instrument payable to the order of a third person, places thereon his signature in blank before delivery, he is liable *as indorser* to the payee and to all subsequent parties. That the contract of indorsement is very different from that of guaranty will scarcely be controverted. On that point the authorities are in perfect accord. *Belden v. Hann*, (Iowa) 15 N. W. 591; *Harnett v. Holdredge, et al.*, (Neb.) 97 N. W. 443; *Farmer v. Rand*, 14 Me. 225. The placing of the words, "Notice and protest waived" over the name of an indorser in blank of a promissory note, converts his contingent liability into an absolute one. (*Davis v. Eppler* (Kan.) 16 Pac. 793; *Schwartz et al. v. Wilmer* (Md.) 44 Atl. 1059.)

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RESPONDENTS' POINTS

The note on its face is *payable at the Farmers' & Stockgrowers' Bank and the Farmers' & Stockgrowers' Bank is the payee*. Section 1639 of the present negotiable instrument act under such circumstances makes the note itself equivalent to a check or an order on the bank to pay. No further demand or presentment is required. Even without the aid of our negotiable instrument act no demand and presentment is required where the note is made payable at the bank and is owned by the bank. (Daniels on Negotiable Instruments, 6th Ed., Vol. 1, Sec. 637, also Sec. 657.) Presentment and demand are not necessary where the notes are owned by the bank and by their terms are payable there. (*Havlin v. Continental Nat. Bank*, 161 S. W. 741, 743; *Bank of U. S. v. Smith*, 11 Wheat [U. S.] 171; *Berkshire Bank v. Jones*, 6 Mass. 523; *Central Bank v. Stoddard*, 76 Atl. 472.) Of course the *fact* as to whether the defendants received notice of non-payment was a fact within their own knowledge and could not be denied *on information and belief*. If they did not receive notice, they knew this fact and knew it at all times. (*Gridler v. Farmers and Drovers Bank*, 75 Ky. 333; *Davis v. Miller*, 55 N. W. 89; *Glidden v. Chamberlain*, 46 N. E. 103.) Notice of dishonor to the indorsers was not in any sense material. For the indorsers admit they paid five installments upon the note six months after it became due, at a time when they are presumed to have known it had not been paid. Their conduct in so doing was an implied waiver of laches and failure to give notice. The waiver is as effective as though they had written "*Notice and protest waived.*" (Daniel on Negotiable Instruments, 6th Ed., Vol. 2, Secs. 1165 and 1166; *Knapp v. Runals*, 37 Wis. 135; *Whitaker v. Morrison*, 1 Fla. 29; *Sigourney v. Wetherell*, 6 Met. 555; *Sherer v. Easton Bank*, 33 Pa. 134; *Amor v. Stoeckle et al.*, 78 Me. 1046; 7 Cyc. 1133; 3 L. R. A. [N. S.] 1079, note.) There is no allegation that these payments were made at a time when the defendants were ignorant that they had not been served with notice of dishonor. Indeed, they could not well say so. *It was a matter of personal knowledge*. They knew and must have shown six

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months after the note became due whether or not they had been notified. And were the rule otherwise, *the unqualified admission that they made payments implies that they made these payments with knowledge of the fact.* If they were ignorant at the time they made the payments that proper steps had been taken to hold them they should have so pleaded, for the admission *casts upon them the burden of showing their ignorance.* (*Loose v. Loose*, 36 Pa. 538; *Oxnard v. Carnum*, 111 Pa. 193.)

CORFMAN, J.

This was an action brought in the district court of Salt Lake County by the plaintiff on a promissory note against the defendant Pahvant Valley Land Company, a corporation, as maker, and the nineteen other defendants, as guarantors thereof. The complaint is in the usual form, alleging: Execution of the note on the part of the defendant Pahvant Valley Land Company, as maker, and the indorsement thereof by the other defendants guaranteeing payment and waiving notice and protest; that demand was made at maturity upon Pahvant Valley Land Company and the other defendants; that the note has not been paid, except the interest in part; that the plaintiff is the owner and holder of the note; that the note provides for reasonable attorney's fees; and that \$1,000 is a reasonable fee to be paid in the suit. Judgment is prayed for \$10,000, the principal sum, \$761.89, interest, \$1,000, attorney's fees, and costs. A copy of the note with indorsements is attached to and made a part of the complaint.

The answer of the defendants here appealing was as follows:

"(1) That prior to the execution and delivery of the said note plaintiff held three certain instruments purporting to be promissory notes executed by the defendant Pahvant Valley Land Company, representing an alleged indebtedness in a sum less than \$10,000, and that the plaintiff, for the purpose of enhancing the value to it of the said alleged indebtedness, agreed to advance to the said defendant Pahvant Valley Land Company an additional sum, which, together with the original sum, should amount to \$10,000, upon condition that the

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\$10,000 note should receive the indorsements of certain persons among whom were these defendants; that in pursuance thereof, and without any consideration whatever moving to these defendants, they and each of them were induced to, and did, write their names on the back of said note before its delivery to the plaintiff, and that the plaintiff, through its officers and agents, by representations and persuasions induced these defendants to become indorsers on said notes; that at the time of the indorsement of said note by these defendants, as aforesaid, it was represented to each of them that the signatures of certain parties other than those who actually did indorse, to the total number of approximately thirty, would be obtained in the same manner as were the signatures of these defendants, and on condition that all such other indorsements should be obtained, and with that distinct understanding, and relying upon said promise and representation, each of these defendants did write his name upon said note as aforesaid, but the said promissory note was not indorsed by the number, nor by the persons whose signatures were to have been thus obtained before these defendants should in any event become liable as indorsers upon said note.

“(2) That these defendants, if bound at all upon said note, were liable as accommodation indorsers, and not otherwise, but that plaintiff did not give notice of nonpayment by the defendant Pahvant Valley Land Company to any of these defendants, and therefore none of these defendants are indebted in any sum whatever to the plaintiff.

“(3) These defendants further allege that an examination by them of the original note upon which they wrote their names in blank as aforesaid has, since they so wrote their names thereon, been altered by the placing thereon of the following words by means of a stamp; ‘Notice and protest waived, and for value received payment of the within note guaranteed by’—and that said stamp was placed upon said note fraudulently subsequent to their signing as aforesaid, and without the knowledge or consent of these defendants.”

A reply was filed by the plaintiff to the answer.

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Before proceeding to a trial, on the day set for hearing in the district court a motion was made by the plaintiff for a judgment on the pleadings, which motion was sustained by the court with the proviso that defendants have until the following day to propose amendments to their answer. Defendants declined to amend their answer, whereupon the court rendered judgment on the pleadings in favor of the plaintiff and against the defendants, from which judgment this appeal is prosecuted. The only question for this court to determine therefore, is whether or not the trial court committed error in sustaining plaintiff's motion for a judgment upon the pleadings.

It is conceded that, in a proper case, courts have the inherent power to grant such motions; and it is likewise conceded that, if the answer of the defendants presented a single material issue to be tried, the court erred in granting the motion in question.

It is contended by appellants that their answer presented and raised four material issues, viz.: (1) Conditional indorsement of note; (2) alteration of indorsement; (3) correctness of note; (4) ownership of note. It is affirmatively alleged in the answer of the appellants that their indorsement of the note in question was obtained with the understanding and their reliance upon the representation and promise that others than themselves were to indorse the note whose signatures were never obtained.

It has been held by this court in the case of *State Bank of Utah v. Burton-Gardner Co.*, 14 Utah, 420, 48 Pac. 402, cited and relied upon by appellants in their brief, that such a defense, when properly pleaded, of course, is sufficient; and we think the rule of law as in that case enunciated 1, 2, 3 is the proper one, and is in harmony with the great weight of authority. The difficulty, however, presented by the appellants' pleading in the case at bar is whether or not they have stated facts sufficient to enable the trial court to permit them to go to trial upon such an issue. Before a defense can be successfully made that an indorsement in blank of a promissory note was conditional, it must be shown that the conditional indorsement was accepted by, or was made

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with notice to, or acknowledged on the part of, the payee before or accompanying the delivery; and it necessarily follows that before proof of such a defense can be offered the facts constituting the defense must be pleaded with common certainty. *Flint v. Nelson et al.*, 10 Utah, 261, 37 Pac. 479; *State Bank v. Burton-Gardner Co.*, supra; *Carter v. Moulton*, 51 Kan. 9, 32 Pac. 633, 20 L. R. A. 309, 37 Am. St. Rep. 259; *Humphreys v. Crane*, 5 Cal. 173; *Dunham v. Travis*, 25 Utah, 65, 69 Pac. 468.

Appellants also made the contention that the note in question has been materially altered since the placing of their names thereon by the words, "Notice and protest waived, and for value received payment of the within note guaranteed by," being written above their signatures, and that said words were stamped upon said note fraudulently and without the knowledge and consent of the appellants.

Again, we are confronted with the question: Have the appellants by their answer stated facts sufficient to entitle them to proceed to the trial of the issue sought to be raised by the allegations of their answer? It is to be observed that appellants' answer signally fails to state when or 4 by whom the alleged wrongful stamping of the words complained of was done. It may be conceded that, under all the authorities, and the statutory law of this state as well, the defense claimed by appellants, when sufficiently pleaded, raised an issue to be tried and submitted to the trial court or the jury properly determining the facts from the evidence submitted; but in the case at bar we think the court was amply justified in ruling that the appellants here had not sufficiently stated such a defense by their answer to the plaintiff's complaint.

In view of the fact that plaintiff specifically alleged in its complaint that interest payments had been made by the defendants at divers times and for stated amounts since the maturity of the note in question, it then became material for the appellants to say in effect by their answer, before they could rely upon it as a defense, that the alteration complained of was made, not only without appellants' knowledge and

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consent, but that the alteration had been made by the plaintiff, its privity, or with knowledge on the part of plaintiff, before delivery, and, further, that appellants have not since acquiesced in or ratified the alteration. These matters were material allegations, without which the answer of the appellants was insufficient and did not constitute a defense to the plaintiff's complaint.

The stamping complained of by appellants as an alteration of the note set forth in plaintiff's complaint appears to be regular on its face, without erasures, interlineations, or improper action indicating that it was not duly authorized. Therefore the presumption, as held by the great weight of authority, is that the stamping was properly made on the note before delivery to the plaintiff. *Towles v. Tanner*, 21 App. D. C. 530; *Galloway v. Bartholomew*, 44 Or. 75, 74 Pac. 467, 1 R. C. L. p. 1041, and cases cited in note.

Assuming that the note was materially altered, also the facts stated in the answer when and by whom the alteration was made, it further appears from the plaintiff's complaint that interest payments were made from time to time covering a period of approximately six months after the maturity of the note, thus in effect pleading ratification on the part of the appellants, as held by the great weight of authority. *Tiedeman on Commercial Paper*, section 396; *Joyce, Defenses to Commercial Paper*, section 150; *Holyfield v. Harrington et al.*, 84 Kan. 760, 115 Pac. 546, 39 L. R. A. (N. S.) 131; *Divide Canal & Reservoir Co. v. Tenney*, 57 Colo. 14, 139 Pac. 1110. Of course, the rule is, as stated in appellants' brief, that a party must have actual knowledge of the alteration before payment would constitute a ratification; but when, as here, payment is set forth in the complaint, and admitted in the answer, without alleging it was made without appellants' knowledge or consent, ratification, to our minds, is sufficiently implied. 2 C. J. p. 1258.

The general rule of pleading alteration of a written instrument under the Code requires that, where the instrument is declared upon in its altered form, as here claimed by appellants, the answer should be in the form of a general

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denial of all the material allegations of the complaint, 7
or a specific denial of the execution of the instrument
or a specific statement of the facts relied upon for a
defense. 2 C. J. p. 1261. The answers of the appellants in
the case at bar did not meet these requirements.

We have carefully reviewed the authorities cited by appel-
lants in their brief, and, after doing so, we do not think they
support their contention that the trial court erred in sus-
taining the plaintiff's motion for a judgment on the plead-
ings, especially after affording the appellants the opportunity
to propose amendments to their answer and their declining to
do so. Therefore the judgment of the trial court must be
affirmed, with costs to respondent.

It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

KENT v. KENT, et al.

No. 3000. Decided April 26, 1917. Rehearing Denied May 21, 1917.
(165 Pac., 271.)

1. TRUSTS—CONSTRUCTIVE TRUSTS—FOLLOWING TRUST PROPERTY. A trust will not be impressed upon funds or property in the hands of the alleged trustee where the original trust property or trust fund cannot be traced or identified either in its original or substituted form. (Page 47.)
2. TRUSTS—CONSTRUCTIVE TRUSTS—PLEADING. A complaint, setting up the receipt of funds by alleged trustee for investment, the investment of such money, the mingling and confusion thereof with private funds of the trustee, and that such trust property cannot be traced or segregated, held to preclude plaintiff from establishing trust. (Page 48.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Emeline H. Kent against John D. Kent and others.

Judgment for defendants. Plaintiff appeals.

Appeal from Cache County, First District

AFFIRMED.

John A. Bagley for appellant.

Richards, Hart & Van Dam for respondents.

FRICK, C. J.

The plaintiff commenced this action in equity to impress certain property with a trust and to recover the trust fund. In her complaint she alleged that:

The defendants are the executors of the estate of one Sidney B. Kent, deceased; "that in 1881 the plaintiff was the owner of certain real property in Davis County, Utah; that at that time it was agreed by and between the plaintiff and Sidney B. Kent, deceased, that said property should be sold by Sidney B. Kent, and that he should invest the proceeds thereof in real estate and personal property in Cache County, Utah, and hold the same in trust for the use and benefit of the plaintiff; that pursuant to the said agreement between the plaintiff and Sidney B. Kent the said Davis County property was sold by Sidney B. Kent for the sum of \$4,500 in cash, which said amount was received by Sidney B. Kent as trustee, pursuant to said agreement to be invested in property in Cache County, Utah, for the use and benefit of the plaintiff; that afterwards and during the lifetime of the said Sidney B. Kent, deceased, but the real dates are unknown to the plaintiff, the said Sidney B. Kent, deceased, used the said \$4,500 in purchasing, acquiring, and improving real property and in purchasing personal property in Cache County, but the said Sidney B. Kent, deceased, in purchasing and improving said property, mingled the said \$4,500, which he held in trust for the plaintiff, with his own private funds, and so used and invested said trust fund that it cannot now be traced and cannot be segregated from the private property of the said Sidney B. Kent, deceased; that by reason of the said agreement between plaintiff and the said Sidney B. Kent, deceased, a trust was created in favor of the plaintiff with Sidney B. Kent, deceased, trustee, and the said \$4,500, thereby became a trust fund; that Sidney B. Kent died on or about the 8th day of December,

1914, and at the time of his death was a resident of Cache County, state of Utah, and at the time of his death he held the said \$4,500 in trust for the use and benefit of the plaintiff; that the said Sidney B. Kent never, at any time, denied or repudiated said trust; that the said Sidney B. Kent, during his lifetime did not, and the defendants have not, paid to the plaintiff the said \$4,500 or any part thereof."

Plaintiff also alleged that she had duly presented her claim to said executors for allowance, and that they had rejected the same. She prayed judgment that the trust be established, and that she recover judgment for said \$4,500 with legal interest. The defendant, M. E. Kent, demurred to the complaint: (1) That it "does not state facts sufficient to constitute a cause of action"; (2) that the action is barred; and (3) that the complaint is uncertain and ambiguous in certain particulars. The two other defendants filed an answer to the complaint, which, however, has no bearing upon the case. The district court sustained the general demurrer, and, the plaintiff electing to stand on her complaint, judgment dismissing the same was duly entered, from which she appeals.

The only error assigned is that the district court erred in sustaining the demurrer. The only matter, therefore, that concerns us on this appeal is the correctness of the ruling of the district court in sustaining the general demurrer. It will be observed that the plaintiff in her complaint, among other things, alleges that:

"Deceased, in purchasing and improving said property, mingled the said \$4,500 which he held in trust for the plaintiff *with his own private funds, and so used and invested said trust fund that it cannot now be traced and cannot be segregated from the private property of the said Sidney B. Kent, deceased.*" (Italics ours.)

Suppose, after a trial of a case in which it is sought to impress a certain fund or property with a trust, the court should find from the undisputed evidence that the facts were precisely as they are alleged to be in the foregoing statement, would not such a finding completely dispose of the claim that there was any property or fund upon which a trust

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could be impressed? Such a finding would conclusively show that the claimant had no better right to any specific property of the deceased's estate than any general creditor would have.

The courts have frequently considered and passed upon claims like the one before us, but we know of no 1 case where it has been held that a trust could be impressed on property or funds where it is conceded to be impossible to trace or identify the property or fund, either in its original or substituted form. The law upon that subject is well stated in an early California case, entitled *Lathrop v. Bampton*, 31 Cal. 22, 89 Am. Dec. 141, in the following words:

“Before a cestui que trust can claim specific real or personal property he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form. The rule upon this subject is well and concisely stated by Mr. Justice Lewis in Thompson's Appeal, 22 Pa. 17: ‘Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description.’ Story Eq. sections 1257, 1259; Tiffany and Bullard on Trusts and Trustees, 33, 34.”

In *Orcutt v. Gould*, 117 Cal. 315, 49 Pac. 188, and in *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861, the case of *Lathrop v. Bampton*, supra, is approved and followed. In *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570, the law upon the subject now under discussion is stated thus:

“When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails.”

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The foregoing case is followed in *Lowe v. Jones*, 192 Mass. 94, 78 N. E. 42, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551. To the same effect is *Pryor v. Davis*, 109 Ala. 117, 19 South. 440. Many more cases could be cited, but it is unnecessary to do so.

The doctrine announced in the foregoing cases is followed by this court in the case of *Waddell v. Waddell*, 36 Utah, 435, 104 Pac. 743. In that case this court did just what 2 is said in *Little v. Chadwick*, supra, a court of equity should do, namely, we went just as far as we could in "tracing and following the trust money." In the *Waddell* Case we applied as liberal a rule as, with reasonable safety, can be applied in following trust funds and in enforcing the trust. It was, however, not held in the *Waddell* Case, nor in any other, so far as we are aware, that a court has ever impressed, or has attempted to impress, a trust upon certain property or upon a certain fund where the original trust property or trust fund can no longer be traced or identified, either in its original or substituted form. That is just what, under the allegations of the complaint, we would be required to do if we overruled the demurrer and permitted the plaintiff to prevail upon the allegations of her complaint.

In view of the foregoing conclusion it becomes unnecessary for us to discuss or pass on the other questions raised by the demurrer. The judgment is therefore affirmed. Respondent to recover costs.

McCARTY and CORFMAN, JJ., concur.

KENT et al. v. KENT et al.

No. 2999. Decided April 26, 1917. (165 Pac. 272.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by S. W. Kent and others against John D. Kent and others.

Judgment for defendants. Plaintiffs appeal.

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AFFIRMED.

John A. Bagley for appellants.

Richards, Hart & Van Dam for respondents.

FRICK, C. J.

In this action the same kind of relief is sought as in the case of *Kent v. Kent*, 50 Utah, 44, 165 Pac. 271, immediately preceding this case. The only difference between this and the preceding case is that the plaintiffs are different. The same property that was sought to be impressed with a trust in the preceding case is also sought to be impressed with a like trust in this, and for the same reasons. With the exception of the parties plaintiff, and the allegations relating to formal matters, the allegations of the complaint in this case are the same as in the preceding one. A general demurrer was interposed to the complaint which was sustained by the district court, and, the plaintiffs electing to stand upon the allegations of their complaint, judgment dismissing the same was duly entered, from which they appeal.

For the reasons stated, and upon the authority of the preceding case, the judgment in this case must be, and it accordingly is, affirmed. Respondent to recover costs.

McCARTY and CORFMAN, JJ., concur.

JEREMY FUEL & GRAIN CO. v. MELLEN

No. 2955. Decided April 28, 1917. Rehearing denied June 21, 1917.
(165 Pac. 791.)

1. **JUDGMENT—RES ADJUDICATA—QUESTION FOR JURY.** It is proper for the court to determine the question of res adjudicata as a question of law where there is no dispute regarding the effect of matters or controversies in either the former or the instant action. (Page 54.)
2. **JUDGMENT—CONCLUSIVENESS—RES ADJUDICATA.** Plaintiff seeks to recover upon a negotiable note given in consideration of a crusher and motor. In a prior action in which this defendant was a party, plaintiff sought to foreclose a chattel mortgage lien on said crusher and motor, and in such action the court found that the plaintiff had

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no right, title, or interest to the crusher or motor, and quieted defendant's title thereto. *Held* that, as plaintiff was required to allege and prove consideration as an essential element of his cause of action, the former action is *res adjudicata* of the question of his ownership of the only consideration for the note, and is sufficient to dispose of his claim in this action; it not being necessary that the form of both actions be the same if the question directly involved in the first action is also directly involved in the second. (Page 54.)

3. **JUDGMENT—CONCLUSIVENESS—RES ADJUDICATA.** The fact that the finding in the former action quieting title to the crusher and motor in the defendant went beyond the allegations of defendant's answer in the instant case is immaterial, and in no way affects the question of *res adjudicata*. (Page 56.)
4. **JUDGMENT—CONCLUSIVENESS—RES ADJUDICATA.** As defendant's counterclaim in the instant case for an amount paid on the note was necessarily connected with the same transaction on which the plaintiff based his first cause of action as well as the present, his right to recover on the counterclaim is now barred by his failure to raise it in the former action. (Page 56.)
5. **JUDGMENT—COSTS ON APPEAL.** Under Comp. Laws 1907, section 2970, providing that, if a defendant omit to set up a counterclaim, neither he nor his assignee can maintain an action against the plaintiff therefor, plaintiff is now barred from recovering on his counterclaim by his failure to set it up in the former action entirely apart from the question of *res adjudicata*. (Page 56.)
6. **COSTS—COSTS ON APPEAL.** Where on appeal a plaintiff succeeds in modifying a judgment against him on defendant's counterclaim, but practically plaintiff's whole record and brief are devoted to combating a ruling of the court against him which was affirmed, costs should be awarded to neither party. (Page 57.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Jeremy Fuel and Grain Company against J. W. Mellen, in which defendant filed a counterclaim.

Judgment for defendant. Plaintiff appeals.

Judgment reversed as to counterclaim and otherwise affirmed, and case remanded with directions.

G. M. Sullivan for appellant.

Stewart, Stewart & Alexander for respondent.

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The plaintiff, after alleging the necessary matters of inducement in its complaint, alleged as follows:

“That during the month of June, 1913, for a valuable consideration, the defendant executed and delivered to the plaintiff his certain paper writing, wherein and whereby he promised and agreed to pay to the plaintiff the sum of \$600 during the month of July, 1913; that thereafter defendant paid upon said written obligation, the sum of \$80, and no more, and there is a balance now due plaintiff from defendant upon said written promise the sum of \$520, together with interest thereon from July 1, 1913.”

The plaintiff prayed judgment accordingly.

The defendant answered the complaint, and in his answer he admitted “that on or about the 8th day of June, 1913, he signed a certain paper,” a copy of which is set forth in the answer, and to which we shall refer later. The defendant also admitted that \$80 was paid “upon said writing.” The defendant then at great length sets forth that the plaintiff had commenced a former action in which it had sought to recover upon the same cause of action, that the defendant, with others, was a party to said action, and that the right of plaintiff to recover upon the present cause of action had been fully determined and adjudicated against the plaintiff in said former action. Defendant also set up a plea of want of consideration for said writing, and in a counterclaim demanded judgment for the \$80 aforesaid. There was a reply, the averments of which it is not necessary to refer to.

The issues were tried to a jury, but when both parties had rested the defendant requested the court to direct the jury to return a verdict in favor of the defendant upon the plea of former adjudication, and also upon the plea of failure of consideration, and further asked that the court direct the jury to return a verdict in his favor for the \$80 upon his counterclaim. The court granted defendant’s motion upon the plea of former adjudication, and directed the jury to return a verdict as requested by the defendant, and also directed the jury to find in favor of the defendant upon the counterclaim.

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The jury returned a verdict as directed, upon which judgment was entered.

Plaintiff appeals from the judgment, and insists that the court erred both in directing a verdict on the plea of former adjudication and on the counterclaim for the \$80. Plaintiff's counsel vigorously contends that the district court erred in sustaining the plea of former adjudication, while defendant's counsel as vigorously insist that, under the undisputed facts and the law applicable thereto, the district court could not do otherwise.

The facts upon which the plea of former adjudication rests, and upon which the court acted, briefly stated, are as follows: On June 8, 1913, defendant signed and delivered to the plaintiff the writing before referred to, which reads as follows:

"Salt Lake City, Utah, June 8, 1913.

"For value received, as expressed in a certain bill of sale dated today, I hereby agree to pay to the Jeremy Fuel & Grain Company the sum of \$600.00 on or about July 1, 1913.

"J. W. Mellen."

The bill of sale referred to in said writing reads as follows:

"Sold to Jeremy Fuel & Grain Company for the sum of six hundred dollars (\$600.00) 1 Climax No. 3 crusher, 1 thirty horse power motor.

"Received payment. Bollwinkel Bros., by John Bollwinkel. Witness, J. W. Goodfellow.

"We hereby transfer the above-described bill of sale to J. W. Mellen in consideration of the sum of \$600.00, payment of which is hereby acknowledged. Jeremy Fuel & Grain Co., per J. W. Goodfellow, Agt."

On July 7, 1913, the plaintiff in this action commenced an action against the Bollwinkel Bros. mentioned in said bill of sale to recover a certain sum of money claimed to be due from said Bollwinkel Bros. to the plaintiff and to foreclose said bill of sale. The plaintiff in said complaint, among other things, alleged:

"That on or about the 15th day of February, 1913, the defendants made, executed, and delivered to the plaintiff their

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certain bill of sale for one Climax No. 3 crusher and one 30 horse power motor, that said instrument was given by the defendants, and was accepted by the plaintiff as security for the payment of defendant's account to the plaintiff, part of which amount was then due to the plaintiff, and that it was in reliance upon said security that the plaintiff made further sales upon credit to the defendants."

The plaintiff prayed judgment that "said bill of sale be foreclosed as a chattel mortgage and the property therein directed sold," and that the proceeds "be applied upon the plaintiff's claims." Among others who were made parties to said foreclosure action, or who intervened therein, was the National Bank of Republic. The bank in its answer, in effect, averred that it had obtained a judgment against said Bollwinkel Bros. for a sum in excess of \$1,100; that execution had been duly issued on said judgment and had been levied upon certain real estate belonging to said Bollwinkel Bros. which was duly advertised and sold by the sheriff; that the "Climax No. 3 crusher," and the "thirty horse power motor" mentioned in said bill of sale were affixed upon and constituted a part of the real estate levied on and sold under the execution aforesaid, and that the plaintiff in said action (who is the plaintiff in this action) had acquired no right, title, or interest whatever in or to said Climax No. 3 crusher or in said 30 horse power motor. Defendant in this action was substituted for the bank in the former action and adopted the bank's answer as his own. The court in the former action, in substance, found that said Climax No. 3 crusher and said 30 horse power motor were "annexed to and affixed upon," and constituted a part of the real property which was sold under the execution aforesaid, and which had been purchased by the bank, and by the bank transferred to the defendant. As a conclusion of law the court also found as follows:

"That the plaintiff, Jeremy Fuel & Grain Company, a corporation, has no interest in the property described in plaintiff's complaint and in the findings of fact herein; that neither John Bollwinkel, nor J. P. Bollwinkel, nor the firm of Bollwinkel Bros., nor A. T. Moon, intervener herein, have any

interest in the property described in the complaint, and in the findings herein; that as against all of the parties to this action the said Joseph W. Mellen is the owner of said property; that the said Joseph W. Mellen is entitled to judgment quieting his ownership in said personal property in these findings described; and for costs incurred."

Judgment was accordingly entered in favor of the defendant, Mellen, who, as before stated, had been substituted for the bank.

On the trial of the case at bar it was made to appear without dispute that the consideration for the writing 1
sued on in this action was the Climax No. 3 crusher and the thirty horse power motor, and nothing else; that the expression "for value received," as it is expressed in the writing, referred to the crusher and motor aforesaid, and to no other consideration. The district court, upon the undisputed evidence, thus determined, as a matter of law, that the right of the plaintiff to recover upon the writing in question had been adjudicated in the former action. There being no dispute regarding the effect of the matters in controversy in either the former or in the present action, it was proper for the court to determine the question of *res adjudicata* as a question of law. 2 Black on Judgments, section 631.

The question, however, still remains: Is the plaintiff's cause of action in this action the same as in the former one? In other words, was the subject-matter litigated in the 2
two actions, so far as the plaintiff and the defendant are concerned, the same? It certainly is clear enough that what the plaintiff sought to recover in the first action was a certain amount of money, the payment of which it asserted was secured by certain property consisting of one Climax No. 3 crusher and one thirty horse power motor. Plaintiff there claimed that it had a lien on said crusher and motor, and asked to have them sold and the proceeds thereof applied in payment of its claim. The court found against plaintiff's contention in that regard, and found that it had no right, title, or interest in or to said crusher, or said motor, or either of them. Now, while it is true that the action in this case is based on the writing aforesaid,

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it is equally true that the undisputed evidence shows that the only consideration for the writing in question was the crusher and motor aforesaid. Whether the plaintiff had ever acquired any interest in said crusher and motor was therefore one of the issues in the former action, which issue was found against the plaintiff. In this action it must not be overlooked that the writing in question is not a negotiable instrument, and hence does not import a consideration. The plaintiff was therefore required to allege and prove a consideration. In view that the evidence is without conflict, that the only consideration for the writing was the crusher and the motor, and that the evidence is also undisputed that it was adjudicated in a former action that the plaintiff at the time the writing was given did not have, and that it never had, any right, title, or interest in said crusher or motor, or in either of them, therefore the question of consideration for the writing in question, and which the plaintiff was required to establish, was adjudicated in the former action. An essential element which the plaintiff was required to prove as part of his cause of action in the present action was therefore adjudicated against him in the former action, and hence, as between the parties to this action, that issue is *res adjudicata*. Suppose the plaintiff had prevailed in the former action, and the crusher and motor had been sold, and the proceeds thereof applied in satisfaction of its claim; could it successfully maintain another action on the writing in face of the former judgment in case that judgment was pleaded as is done in this case? We think no one would seriously so contend. If the plaintiff would be estopped from maintaining a second cause of action if it had succeeded in the first one, it is likewise estopped from successfully maintaining the second one in case it failed in the first one. This case comes squarely within the rule laid down by the author in 2 Black on Judgments, section 609, in the following words:

“It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties, or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein.”

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In *Goodenow v. Litchfield*, 59 Iowa, at page 231, 9 N. W. 109, Mr. Justice Rothrock, in referring to the rule respecting former adjudication, says:

“The rule as appears to be well settled by all the authorities, is that, where a former judgment or decree is relied upon as a bar to an action, it must appear either by the record or by extrinsic evidence that the particular matter in controversy and sought to be concluded was necessarily tried and determined in the former action.”

Neither is it necessary that the form of both actions be the same. The test is: Was the question directly involved in the first action and also directly involved in the second one? *Bank v. Rude*, 23 Kan. 143; *Spear v. Tidball*, 40 Neb. 107, 58 N. W. 708. The foregoing cases leave no room for doubt that the plea of res adjudicata in this case was established, and that the district court did not err in declaring it established, as a matter of law.

We are not unmindful of plaintiff's contention that the findings of the district court in the former action, in effect, quieting title to the crusher and motor in the defendant, went beyond the allegations of defendant's answer. If it be conceded that counsel is right in his contention, yet that 3 in no way effects the question we have just decided. The finding that the plaintiff did not have, and never had, any right, title, or interest in and to said crusher and motor, or in either of them, was in issue and is squarely found. That is quite sufficient to dispose of plaintiff's counsel in this action.

Plaintiff's counsel, however, also insists that the court erred in directing a verdict on defendant's counterclaim in his favor. It seems to us that, under the undisputed facts, counsel's contention should prevail. The counterclaim arose out of and was necessarily connected with the same 4, 5 transaction on which plaintiff based his first cause of action, as well as the present one. If, therefore, the defendant intended to counterclaim against the plaintiff, he should have done so in the first action. Suppose the defendant had sued the plaintiff in an independent action, and the plaintiff had set up the former adjudication. Could the defendant recover? It would seem not. But, entirely apart from the question of res adjudicata in the sense that question is usually considered,

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the defendant is now barred from recovering under our statute, Comp. Laws 1907, section 2970.

As just pointed out, this claim arose out of the transaction set forth in plaintiff's complaint and was also connected with the subject of the action in both the former and the present action, and hence he cannot, under section 2970, *supra*, maintain a separate action for the amount claimed by him. Nor can he maintain a counterclaim in another action for such amount. (Plaintiff's reply was sufficient to raise the question of the defendant's right to recover on the counterclaim.) The court therefore erred in directing a verdict for the defendant. Indeed, under the undisputed facts, the court should have directed a verdict for the plaintiff against the counterclaim.

The only question left to determine is one of costs. While it is true that the plaintiff has succeeded in modifying the judgment, it is also true that practically plaintiff's whole record and brief are devoted to combating the court's ruling on the question of former adjudication. In view 6 of that fact, we have concluded that costs should be awarded to neither party. The ruling and judgment of the district court on the question of *res adjudicata* are therefore affirmed, and the ruling and judgment on the counterclaim are reversed. In view, however, that this question is one of law merely, the cause is remanded to the district court of Salt Lake county, with directions to set aside the judgment upon the counterclaim in favor of the defendant and to enter a judgment in favor of the plaintiff and against the defendant upon the counterclaim.

McCARTY and CORFMAN, JJ., concur.

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WARM SPRINGS CO. v. SALT LAKE CITY

No. 3020. Decided May 18, 1917. Rehearing denied June 21, 1917.
(165 Pac. 788.)

1. **MUNICIPAL CORPORATIONS—RENT FOR PROPERTY LEASED BY CITY—EVICTION BY ORDINANCE.** Where premises belonging to a city were leased for the purpose of conducting a bathing resort, with the provision that a portion of the premises might be leased or sublet for saloon or bar purposes, and subsequently, pursuant to Laws 1911, c. 106, an ordinance was passed by the city by which the carrying on of the saloon business on such premises was prohibited, the mere fact that the saloon business was prohibited did not constitute an eviction, and the defendant was not thereby released from paying rent, and was not entitled to any abatement thereof, since if the lessee desired to protect itself against the payment of rent in case the right to maintain a bar on the premises should be prohibited it should have provided for that emergency in the lease. (Page 64.)
2. **MUNICIPAL CORPORATIONS—RENT FOR PROPERTY LEASED BY CITY—EVICTION.** While the city in entering into the lease did so as proprietor of the property, and is governed by the same law and rules as other proprietors, in passing and enforcing the ordinance, pursuant to the provisions of Laws 1911, c. 106, it acted entirely in a governmental capacity, and as an arm of the state government, and had no more right to disregard the provisions of that chapter than a private citizen, and is not liable for the consequences of such governmental act. (Page 64.)
3. **MUNICIPAL CORPORATIONS—LEASE BY CITY—STATUTE.** If a city should guarantee its lessee the right to continue the saloon business in violation of Laws 1911, c. 106, providing that licenses permitting the sale of intoxicating liquors should not be issued outside the limits of the business district of a city or town, and requiring cities to pass ordinances fixing such limits for the purposes of the act, the lease would be void, since municipal corporations have no power to make contracts which would embarrass or control their legislative powers and duties. (Page 65.)
4. **LANDLORD AND TENANT—RENT—PARTIAL EVICTION.** Generally a tenant may not hold possession of premises, and then sue for an abatement of rent on the theory of partial eviction. (Page 66.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by the Warm Springs Company against Salt Lake City.

Appeal from Salt Lake County, Third District

Judgment dismissing complaint. Plaintiff appeals.

AFFIRMED.

D. H. Wenger for appellant.

H. J. Dininny, City Attorney and *W. H. Folland* and *M. Davis* Asst. City Attys. for respondent.

FRICK, C. J.

The plaintiff in this action seeks to recover certain moneys which it is alleged the defendant city wrongfully obtained from it for rental of certain premises leased to the plaintiff by the city. In view that the court's findings of fact are not assailed, and as they correctly reflect the issues and the evidence, and because the conclusions of law and judgment which are based upon the findings are vigorously assailed, we insert the court's findings, the material parts of which read as follows:

"That on the 21st day of February, 1905, pursuant to a resolution of the mayor and city council, the said Salt Lake City, defendant herein, entered into an agreement in writing with one Maxwell R. Brothers, his executors, administrators and assigns, whereby said defendant did lease and let unto Maxwell R. Brothers, for a period of ten years, the following described real estate and premises, to wit: All that property situate in Salt Lake City, county of Salt Lake, state of Utah, described as block 157, plat 'A,' Salt Lake City survey, known as the Warm Springs property, including the springs and land inclosed by fence, but not including the gravel beds on said tract; to have and to hold the said premises with their appurtenances unto the said Maxwell R. Brothers, his executors, administrators and assigns, from the 31st day of March, 1906, to and including the 31st day of March, 1916, for the purpose of conducting a bathing resort, with the privilege of subletting a portion of said premises for bar purposes; and in consideration of the said leasing and letting of said premises to him as aforesaid, the said Maxwell R. Brothers as aforesaid agreed to pay the defendant as rent for said premises the sum of \$200 per month for each and every month of said term.

Said lease as set forth in defendant's answer is hereby referred to and made a part of these findings of fact. That on or about the 19th day of January, 1906, the said Maxwell R. Brothers assigned said lease to the said Warm Springs Company, the plaintiff herein, and said plaintiff was, during the whole of said term of ten years, the successor in interest of the said Maxwell R. Brothers, with the knowledge, acquiescence and consent of said Salt Lake City, and the said plaintiff at all times during said term paid said sum of \$200 per month rent as in said lease provided, and has complied with all other covenants and conditions of said lease, as the assignor of said Maxwell R. Brothers, and the said plaintiff was at all times entitled to sublet a part of said premises for bar purposes. That under said agreement and lease the plaintiff herein, upon the payment of said sum of \$200 per month, and as consideration therefor, was to have the privilege of conducting a bathing resort, leasing or subletting a portion of said premises for saloon or bar privileges. That the reasonable rental value of said premises as a bathing resort was \$100 per month, and the rental value of said saloon for bar purposes was \$100 per month, and that said plaintiff at all times during the term of said lease was able to let and lease said premises for bar purposes at the rate of \$100 per month. That pursuant to said agreement the plaintiff did sublet a part of the said premises, known as the saloon building for bar purposes, beginning on the 21st day of March, 1906, and continuously until the 20th day of June, 1911, at the rate of \$100 per month, and that after the 20th day of June, 1911, the said plaintiff was prevented from further leasing and subletting said premises or any part thereof for bar purposes for the reason that said real estate, as above described, and the surrounding premises were excluded by city ordinance of Salt Lake City from the district in which intoxicating liquors might be sold, and that thereafter until the end of said term of said lease said premises were excluded by reason of said ordinance passed pursuant to the authorization of the Legislature of the state of Utah, from the business district in which intoxicating liquors might be sold. That after said exclusion by said city ordinance the

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said defendant refused to pay to the plaintiff any rebate or bonus because of said exclusion. That on the 6th day of April, 1916, the plaintiff herein presented its claim against said city for the sum of \$5,700, which said claim was refused by said defendant, and that after the 20th day of June, 1911, to the end of said rental term said rent was paid by plaintiff under protest."

The conclusions of law are as follows:

"That said city in its governmental and legislative capacity did rightfully pass an ordinance under proper authority from the state of Utah, excluding said property above described from the district in which intoxicating liquors might be sold. That in its private and personal capacity said city did enter into a lease with said parties as aforesaid, and that defendant did collect rents from said plaintiff as set forth, by the provisions of said lease heretofore referred to. That said lease in question does not contain a restrictive clause, but does contain a permissive clause which permitted the said plaintiff to rent a part of said premises for bar purposes. That there was no guaranty or warrant by which said defendant was bound to continue the permissive privilege after said ordinance excluding said property from the restricted district was passed. That said defendant did lawfully and legally collect said rent from said plaintiff, and that therefore said plaintiff has no cause of action against the defendant in the premises."

Judgment was entered dismissing the complaint, from which plaintiff appeals.

The assignments of error are all directed against the conclusions of law and judgment. Plaintiff's principal contention arises upon the proviso in the lease which reads as follows: "Provided, however, the said party of the second part may sublet a portion of said premises for bar purposes." In 1911 the Legislature of this state passed chapter 106, Laws Utah 1911, p. 152, in which it was provided that licenses permitting the sale of intoxicating liquors shall not be issued or granted "outside of the limits of the business district of any city or town. The mayor and city council in their respective cities
• • • shall from time to time determine and fix such limits

for the purposes of this act." Pursuant to that chapter an ordinance was passed by the defendant city in which the district in which the bar was maintained by plaintiff was declared to be outside of the business district of the city and within which a license to sell intoxicating liquors would not thereafter be granted. The plaintiff, therefore, was unable to obtain a license to sell intoxicating liquors upon the leased premises, and hence it lost the right to sublet a part of the premises for bar purposes as provided in the clause of the lease we have quoted. The plaintiff did not surrender nor offer to surrender the demised premises, but paid that portion of the rent which it is contended the bar privilege was worth under protest, and by this action seeks to recover back the rent thus paid.

Plaintiff's counsel, as we understand him, contends that the district court erred in denying recovery upon the grounds: (1) Because the city, by adopting and enforcing the ordinance in question, by its own act, deprived plaintiff of subletting a part of the demised premises for bar purposes, and hence it "ex equo et bono" cannot retain that portion of the rent which represents the value of the bar privilege; and (2) that by the act of the defendant city the plaintiff was in legal effect evicted so far as the right of maintaining a bar is concerned, and for that reason the defendant city may not retain that portion of the rent demanded by the plaintiff. Counsel, in support of his contention, cites the following cases: *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 79 N. E. 827; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Lynch v. Baldwin*, 69 Ill. 210; *Grabenhorst v. Nicodemus*, 42 Md. 236; *Allsman v. Oklahoma City*, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184; *Pearson v. City of Seattle*, 14 Wash. 438, 44 Pac. 884. Counsel also refers us to 28 Cyc. 674. We cannot, nor is it necessary for us to, pause here to point out the distinction between those cases and the case at bar. It must suffice to say that the decisions of the foregoing cases do not authorize a recovery in a case like the one at bar. We have found one case, however, which is not cited by counsel, namely, *Heart v. East Tenn. Brewing Co.*, 121 Tenn. 69,

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113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753, in which it was held that a lease on certain premises which were leased for saloon purposes terminated when the prohibitory law, which was passed after the lease had been entered into, went into effect. The decision is based upon the ground that when the prohibitory law went into effect the business of conducting a saloon was unlawful; that the premises were therefore leased for an unlawful purpose, and hence the lease terminated, and the tenant was released from paying rent. The great weight of authority as we shall see, is however, contrary to the case just referred to. In the following, among other, cases it is held that where premises are leased for saloon purposes, and, pending the lease, a law is passed by which the right to deal in intoxicating liquors is prohibited, and hence a saloon business may no longer be carried on, the tenant is not, for that reason, released from paying rent for the demised premises, and that in case the premises in connection with the saloon business are also used for other purposes, or that they thereafter can be used for such other purposes, to prevent the tenant from carrying on the saloon business does not amount to an eviction and that he is not entitled to an abatement of the rent. *Lawrence v. White*, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N. S.) 966, 15 Ann. Cas. 1097; *O'Byrne v. Henley*, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496; *San Antonio Brewing Ass'n v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Kerley v. Mayer*, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, affirmed in 155 N. Y. 638, 49 N. E. 1099. Quite a number of cases in which the same doctrine is held are cited by the annotator in the notes to the case in 19 L. R. A. (N. S.) 966. See, also, 1 Tiffany L. & T. section 182, p. 1160, and 2 Tiffany L. & T. section 185, p. 1289. In the case of *Lawrence v. White*, supra, Mr. Justice Lumpkin, in speaking for the court, says:

"The question in the case is whether the lessee of a hotel, including a barroom was entitled to a reduction or proportional abatement of the agreed rental, because during the term of the lease the Legislature of the state enacted a law prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, and thus the bar could no longer be used for that purpose. The adjudicated cases with unusual uniformity answer this question in the negative, though they do not all give the same reasons for the ruling. It has been very generally held that the enforcement by

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public officers of restrictions or conditions in regard to the use of leased premises does not amount to an eviction of the tenant."

In the case of *O'Byrne v. Henley*, supra, the law in the headnote, which correctly reflects the opinion, is stated in the following language:

"Where premises are leased for saloon purposes at a time when it was lawful to sell intoxicants and the premises are used by a lessee as a saloon for the sale of intoxicants, soft drinks, etc., the passing of a prohibition law prohibiting the sale of intoxicants does not have the effect to release the lessee from liability for future rent, as his business is not totally destroyed, since the use of the word 'saloon' in the lease, while including the sale of intoxicants, does not exclude the sale of other things, and the business is not totally destroyed."

It is not necessary to quote further from the cases. In the case at bar the premises were leased for the principal purpose of conducting a bathing resort, and the business of carrying on the saloon was a mere incident to the principal business. When, therefore, the ordinance went into effect by which the carrying on of the saloon business on the demised premises was prohibited the tenant was still permitted and continued to conduct the principal business for which the premises were used, namely, the conducting of a bathing resort. Under all of the authorities, therefore, the mere fact that the saloon business was prohibited did not constitute an eviction, and the plaintiff was not thereby released from paying the rent, nor was it entitled to any abatement thereof. If the plaintiff desired to protect itself against the payment of rent in case the right to maintain a bar on the premises should be prohibited by law, it should have provided for that emergency in the lease. Not having done so, it cannot now complain.

It is seriously contended, however, by plaintiff's counsel, that the defendant city, in passing and enforcing the ordinance in question, by its own act deprived the plaintiff of its right to sublet for bar purposes, and for that reason the city is required to abate the rent as claimed by plaintiff. 2 We have already pointed out that the city, in passing and enforcing the ordinance in question, did so in obedience to the command contained in chapter 106, supra. While it is true, as plaintiff's counsel suggests, that the city, in entering

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into the lease, did so as a proprietor of property, and hence is governed with regard to that matter by the same law and rules as other proprietors would be, counsel, however, entirely overlooks the fact that the city, in passing and enforcing the ordinance, acted entirely in a governmental capacity and as an arm of the state government. The city was bound by the provisions of chapter 106, the same as all other persons, and it had no more right to disregard the provisions of that chapter than the plaintiff. If, therefore, the city had undertaken to contract or enter into an agreement with the plaintiff so as to relieve it from the effects of chapter 106, such an agreement would have been void and of no effect. The law respecting that subject is very clearly stated by the author in 3 McQuillin Mun. Corps. section 1169, in the following words:

"The settled rule is that municipal corporations have no power to make contracts which will embarrass or control their legislative powers and duties. A city cannot by contract deprive itself of any of its legislative powers, and hence cannot agree that a sidewalk should only be graded to a certain depth. A common council 'cannot bargain away or divest itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community.' So, power given to contract respecting a particular thing does not confer power, by implication, to contract even with reference to such thing so as to embarrass and interfere with its future control of the matter, as the public interests may require."

If the city had entered into a lease in which it had guaranteed the plaintiff the right to continue the saloon business in the teeth of chapter 106, the lease to that effect would have been void. What could not be accomplished directly, therefore, cannot be accomplished indirectly by com- 3
pelling the city to pay back part of the money it had received as rent for the demised premises. If by some unlawful act the city in its capacity as proprietor had interfered, or if it had entered into an enforceable covenant not to do so, and had, nevertheless, interfered with plaintiff's enjoyment of the premises, the case would be quite different. The distinction between acting in a governmental capacity and as a mere proprietor of property is made quite clear in the case of *Boston Molasses Co. v. Commonwealth*, supra. In that case the com-

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monwealth covenanted as a proprietor of property merely, and hence it was held that it was liable as a proprietor. In this case the act by the city which is complained of was a governmental act, and hence the city is not liable for the consequences of that act.

The law also seems to be that, ordinarily at least, a tenant may not hold on to the premises and then sue for an abatement of the rent upon the theory of a partial 4 eviction. 1 Tiffany L. & T. section 182, p. 1160 et seq., under the title of "Partial Eviction."

We desire to add in conclusion that the case of *Lawrence v. White*, supra, is a very carefully considered case. The other cases we have cited, and in which the doctrine laid down in the Georgia case is followed, are also all well considered, and, in our judgment, there logically is no escape from the conclusions reached in those cases.

The judgment is affirmed, with costs to the defendant.

McCARTY and CORFMAN, JJ., concur.

FRED MILLER BREWING CO. v. GAUDIO et al.

No. 2994. Decided May 8, 1917. Rehearing denied June 21, 1917.
(165 Pac. 786.)

1. **PRINCIPAL AND SURETY—EVIDENCE—BURDEN OF PROOF.** In an action against the surety of a buyer to recover an alleged balance due for merchandise sold, the burden was on the plaintiff to show that the purported statement of account between it and the buyer was correct, more especially where it is seeking to establish a liability on the part of the surety, who has properly controverted plaintiff's allegations of the buyer's indebtedness to it. (Page 69.)
2. **PRINCIPAL AND SURETY—EVIDENCE—SUFFICIENCY.** Evidence held to justify a finding that the plaintiff failed to prove any indebtedness owing to it by the buyer for which the surety was liable. (Page 69.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by Fred Miller Brewing Company against Joseph Gaudio and others. The action was prosecuted against defen-

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dant C. H. Denhalter alone, the other defendants not being served with process.

Judgment for defendant. Plaintiff appeals.

AFFIRMED.

Skeen & Skeen for appellant.

Hancock & Barnes for respondent.

CORFMAN, J.

This was an action brought in the district court of Salt Lake County to recover a balance alleged to be due for merchandise sold and delivered under a written agreement between the plaintiff and the defendant Gaudio, secured by a bond contemporaneously executed on the part of the other defendants as sureties guaranteeing performance and payment on the part of the defendant Gaudio. The complaint, in substance, alleges that on the 7th day of August, 1911, plaintiff and the defendant Gaudio entered into a written agreement whereby the plaintiff was to sell the defendant Gaudio merchandise on credit, not exceeding \$1,000 in amount, in pursuance of which plaintiff had sold and delivered to the said defendant on credit merchandise of the value of \$706.43, which sum is due and owing; that the defendants Whittaker and Denhalter are personally, jointly, and severally answerable therefor on a bond guaranteeing payment of said indebtedness; that payment of said amount was demanded of the defendant Gaudio; and that the same has not been paid by the defendants or either of them. The agreement and bond are attached to the complaint as exhibits and made a part thereof. Plaintiff prays judgment for \$706.43, interest, and costs.

The separate answer, of the defendant C. H. Denhalter is, in effect, a specific denial upon the ground of want of information and belief, and an affirmative defense alleging that the plaintiff has not complied with Comp. Laws 1907, section 352, as amended by chapter 101, Laws 1915, relative to foreign corporations doing business within the state by reason of its failing to file certified copies of its articles of incorporation

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and by-laws with the secretary of state and with the county clerk of Salt Lake County; that the plaintiff had failed to use due diligence to collect from the defendant Gaudio; and that the bond had expired before the indebtedness sued upon was incurred. The defendants Gaudio and Whittaker were not served with process, and the action was prosecuted against the defendant Denhalter alone.

A trial to the court without a jury resulted in findings and judgment in favor of the defendant. Plaintiff appeals from the judgment.

Numerous errors are assigned, but for a proper determination of plaintiff's appeal it will not be necessary for us to discuss and pass upon all of them here, or other than the finding of the trial court:

"That the plaintiff has failed to prove that there is any balance due it from the said Joseph Gaudio, or that there was any balance due it from said Joseph Gaudio at the time of the filing of the complaint herein."

At the trial, pursuant to stipulation, the deposition of C. J. Smith, a witness on behalf of plaintiff, was read wherein he testified that the plaintiff was a corporation organized under the laws of the state of Wisconsin; that it had no branch office or representative located in the state of Utah; and that he was an employee traveling and soliciting trade for it. The plaintiff offered to introduce in evidence a purported statement of the account sued upon and complains of the trial court's refusal to receive it. The only evidence submitted to the trial court to prove the correctness of this statement was that of the witness C. J. Smith, concerning which he testified as follows:

"Mr. Barnes: I would like to interpose a question here. Did you make this statement out? A. No, sir. * * *

"Mr. Skeen: I will ask you whether or not you had any conversation with Mr. Joseph Gaudio with respect to the balance he owed to your company, the Fred Miller Brewing Company, along in October, 1912? A. Yes, sir. Q. State what that conversation was. A. In regard to his account—his indebtedness to the Fred Miller Brewing Company? Q. Yes. A. At that time I had with me a statement from the brewery

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for collection against Mr. Gaudio. I believe after that he failed and moved somewhere down in Illinois. Q. Well, how did you discuss with him the amount that was due to your company, the Fred Miller Brewing Company, at that time? A. At that time I believe he owed us \$1,200 or \$1,300; I cannot just recollect the amount, but somewhere around \$1,200 or \$1,300.

* * * Q. Have you any memorandum to which you could refer to refresh your recollection and state the amount due at that time? A. I haven't anything in my possession at the present time, except this statement. I do not carry the books along with me from the brewery. They are made up by the bookkeeper and submitted to the agents as being correct. * * *

Q. And that was in May? A. In May, 1912. Q. Do you know as to what payments have been made since? A. Nothing, except by referring to the statement. * * *

Q. Can you state the total amount of goods furnished by your company to Joseph Gaudio pursuant to the contract set out as Exhibit A here, and which Joseph Gaudio received at Salt Lake prior to the month of May, 1912? A. Well, I could not unless I referred back to this statement. * * *

"Mr. Barnes: And your knowledge as to the amount due is based on Exhibit B, by reference to Exhibit B? A. Yes, sir. Q. The various amounts you have given in this testimony? A. Yes, sir."

Such was the character of the testimony upon which plaintiff relied, not only for the purpose of proving the correctness of the proffered statement of account rejected by the trial court, but for the purpose of proving its case and to 1 establish a present liability against the defendant as well. The burden was on the plaintiff to show that the account in question was correct, more especially when, as here, it was seeking to establish a liability on the part of a surety having properly controverted the plaintiff's allegation of the defendant Gaudio's indebtedness to it.

After carefully reviewing the record here, we think the trial court's finding that the plaintiff failed to prove any indebtedness owing to it from the defendant Joseph Gaudio is 2 amply justified. In view of the conclusion that the

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plaintiff has failed to prove a case, the defense that it had failed to comply with the Utah statutes relating to foreign corporations becomes immaterial, and we here express no opinion upon that subject.

The judgment rendered in favor of the defendant C. H. Denhalter dismissing him from all liability to the plaintiff must be affirmed, with costs.

It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

CORAY, ADMR. v. PERRY IRRIGATION CO.

No. 3065. Decided June 26, 1917. (166 Pac. 672)

1. CORPORATIONS—ISSUE OF CERTIFICATES—WRONGFUL REFUSAL—PLEADING. A complaint alleging that plaintiff's intestate subscribed for stock in defendant corporation, fully paid therefor by delivering to it a quitclaim deed, and that defendant on demand refused to issue or deliver stock certificate to plaintiff's intestate, or to plaintiff as her administrator, states a cause of action, though it does not allege specifically that plaintiff's intestate was entitled to stock, or character and amount of consideration paid therefor, or that she was entitled to certificate demanded, where it alleges facts from which conclusion as to existence of these essential elements is irresistible. Page 72.)
2. CORPORATIONS—ISSUE OF CERTIFICATE—WRONGFUL REFUSAL—ACTION. An action for damages will lie for the wrongful withholding by a corporation of a stock certificate, in view of Comp. Laws 1907, section 530, recognizing the use of stock certificates as muni-ments of title, and the form of action is immaterial, if complaint shows plaintiff entitled to any remedy legal or equitable.¹ (Page 73.)
3. EXECUTORS AND ADMINISTRATORS—COLLECTION OF ASSETS—POWER TO SUE. Under Comp. Laws 1907, sections 3912, 3915, relating to collection of assets, an administrator may demand of corporation stock to which intestate was entitled, or bring action for damages for its failure to issue stock. (Page 75.)

Appeal from District Court, Second District; *Hon. A. W. Agee*, Judge.

¹ *Kuhn v. McAllister*, 1 Utah, 274, affirmed 96 U. S. 87, 24 L. Ed. 615.

Appeal from Weber County, Second District

Action by L. L. Coray as administrator of the estate of Mary J. Allred, deceased, against the Perry Irrigation Company.

Judgment for defendant. Plaintiff appeals.

REVERSED and REMANDED.

Geo. Halverson for appellant.

John G. Willis for respondent.

THURMAN, J.

Does the complaint state facts sufficient to constitute a cause of action? That is the only issue presented by this appeal. Paragraphs 1 and 2 of the complaint allege the capacity of the plaintiff as administrator of the estate of Mary J. Allred, deceased and also the corporate existence of the defendant. The complaint then proceeds:

“(3) That the said Mary J. Allred, at the time of the incorporation of said defendant, subscribed for 26 shares of its capital stock, and that at the time of said subscription she fully paid said defendant for said shares of stock by the execution and delivery to it of a certain quitclaim deed; that said defendant failed and neglected during the lifetime of the said Mary J. Allred to issue to her its certificate evidencing her ownership of said shares of its capital stock, and has ever since neglected and failed to issue the same to her, or to her legal representatives; that this plaintiff, since his appointment and qualification as administrator as aforesaid, demanded of said defendant to issue its certificate of stock for said shares to him as administrator as aforesaid, and to deliver the same to him, and that he made such demand on or about the 24th day of February, 1916, but notwithstanding the subscription aforesaid, and notwithstanding the demand of this plaintiff as aforesaid, said defendant refused to issue or deliver such certificate to the plaintiff, or any other person, and still refuses so to do; that said stock was at the time of said refusal, and still is, of the reasonable value of \$125 per share, or an aggregate value of \$3,250.” (Prayer for judgment.)

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The defendant interposed a general demurrer to the complaint, which was sustained. The plaintiff elected to stand upon his complaint, whereupon the court entered judgment dismissing the action. Plaintiff appeals to this court, and assigns these proceedings as error.

The complaint is brief and inartificial. It is not as comprehensive and complete as is required by the models of good pleading, but the question we have to consider is: Does it state facts sufficient to constitute a cause of action? The allegations as to the capacity of the plaintiff and the corporate existence of the defendant are unexceptionable. The complaint, in effect, states that plaintiff's intestate, at the time of the incorporation of the defendant, subscribed for 26 shares of its capital stock, and fully paid defendant therefor by delivering to it a certain quitclaim deed; that the defendant, during the lifetime of plaintiff's intestate, failed and neglected to deliver to her a certificate evidencing her ownership of said stock, and likewise neglected and failed to issue a certificate to her legal representatives; that plaintiff, after his appointment and qualification as administrator, as such demanded of defendant that it issue to him, as administrator, a certificate for said shares; and that the defendant refused to issue or deliver said certificate to the plaintiff, or any other person, and still refuses so to do. Plaintiff then alleges the value of the stock, and demands judgment for damages and costs. All of these allegations are admitted by the demurrer.

It is true the complaint fails to allege in specific terms that plaintiff's intestate was entitled to the shares of stock, or the character and amount of the consideration paid therefor, or that she was entitled to the certificate demanded. These are the points wherein the complaint is inartificial, but 1
it does allege facts from which the conclusion is irresistible as to the existence of these essential elements. She was entitled to a certificate because she had subscribed for the same and paid therefor in full. It matters not what was represented by the quitclaim deed, if it was in fact full payment for the stock as alleged in the complaint.

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It is a matter of common knowledge—in fact, it is a fundamental feature of the law of corporations—that certificates of stock are issued for shares that are fully paid for, and that these certificates are evidence of ownership of capital stock in the corporation. They may be transferred by 2 indorsement from one person to another, and pass current in the community for what they purport to be. They are not only valuable as muniments of title, but for convenience in numerous ways in the transaction of business. Certainly, to deprive the owner of shares of a certificate already issued, or to withhold from him a certificate to which he is entitled, is a wrong for which a court of competent jurisdiction, in a proper proceeding, will award adequate relief. Section 330, Comp. Laws Utah 1907, declares capital stock of corporations to be personal property and recognizes the use of stock certificates as muniments of title, and provides for the transfer thereof from one person to another. It recognizes the quasi negotiable character of such instruments, and where the property represented by the certificates is of considerable value, as shown by the complaint in this case, the certificate itself has a pecuniary value separate and distinct from the value of the shares it represents. As we understand the law relating to a case of this kind, the wrongful withholding of a certificate of stock is equivalent to a conversion of the stock itself, and may be so treated by the owner.

While the issue presented by this appeal is simple, and exceedingly so, appellant and respondent seem to be at variance in their understanding as to what the subissues are in determining the principal or main issue. Appellant seems to think the main question is whether or not it is an action for conversion, and whether or not that is the proper remedy. Respondent insists that the question before the court is one of pleading, and not the propriety of a selected remedy. As to the form of the action, it is wholly immaterial under the issues presented. This court, in a case in nearly every respect similar to the case at bar, used the following language:

“It is not necessary for us to consider that this is an action of trover, and that trover is not the proper remedy. To do so would be to tie the pleadings down again to set forms. Some of the language used may be

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that used in trover, but some certainly is not, and it matters very little, under the practice act, whether the language used be that belonging to the form of one action or another, or to no form of action. The material question is: Do the facts stated show the plaintiff entitled to any remedy, legal or equitable? If so, then the court could not say that the complaint did not state facts sufficient to constitute a cause of action." *Kuhn v. McAllister*, 1 Utah, 274.

In the case just cited the plaintiff brought his action for the conversion of shares of stock in a mining corporation. Judgment in the court below was entered against defendant by default. Defendant appealed, and in this court contended that the complaint did not state facts sufficient to constitute a cause of action. The old common-law doctrine was invoked that shares of stock in a corporation, being incorporeal and intangible, are not the subject of conversion, and that therefore trover would not lie. That was the principal contention; and in disposing of it this court used the language above quoted. The case is also authority for the proposition that shares of stock in a corporation are the subject of conversion, and that that form of action will lie. That cause was affirmed by the Supreme Court of the United States, 96 U. S. 87, 24 L. Ed. 615.

We do not know that the form of action in this case is seriously questioned; but it may be stated generally that the modern authorities are almost a unit in holding that shares of stock in a corporation may be the subject of conversion, or the wrongful withholding thereof a breach of contract, and that an action at law for damages is a proper remedy. We cite a few leading authorities in support of the proposition:

"Where the officers of a corporation refuse on demand to issue a certificate to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or in equity to enforce the issue and delivery of the certificate." 26 A. & E. Ency. of Law, 876; 28 A. & E. Ency. of Law, 651; 1 Machen, Corp. section 515; 4 Thompson, Corp. section 3490 et seq.; 10 Cyc. 609, 610.

In *State v. Carpenter*, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556, an Ohio case, the action was mandamus in the court of common pleas to compel the officers of a corporation to issue certificates for shares of stock that had been subscribed and fully paid for. The court rendered judgment in favor of

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defendants, and found further that the relators had an adequate remedy at law. The case was appealed to the circuit court, which found that the relators had fully paid for the stock and were entitled to certificates, but held that the remedy was in equity, and for that reason refused the writ. From this judgment the case was appealed to the Supreme Court. In concluding its opinion that court said:

“Our conclusion is that, where the officers of a private corporation, organized for profit, refuse, upon demand, to issue a certificate of stock to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or in equity to enforce the issue and delivery of the certificate. If, for any reason, the one does not, the other will, afford him a plain and adequate remedy, and he may resort to either at his election. Mandamus cannot, therefore, be properly invoked.”

The last case is cited specially, not only because it is in point in its essential facts, but because there is an intimation, at least, in the argument that the court below thought mandamus was a proper form of action, and for that reason sustained the demurrer. Let it, however, be understood, as stated, in effect, in our quotation from *Kuhn v. McAllister*, supra, that we are not attempting by this opinion to determine the particular form of action of the present case, whether a conversion, which at common law was called trover, or whether it is an action for damages arising from a breach of contract. The distinction for the purposes of this case is wholly immaterial. The single question is: Does the complaint state facts sufficient to constitute a cause of action for any relief? If it does, the demurrer should have been overruled; if not, the judgment of the court below was correct.

The contention of respondent that appellant was not authorized to demand the stock or bring an action for damages is wholly without merit. The principal purpose of appointing an administrator in probate matters is to preserve the estate, collect the assets, and, when necessary, institute 3 proceedings for the purpose of reducing the property of the estate to the possession of the administrator or for other relief. Comp. Laws 1907, section 3912 makes it the duty of the administrator to take into his possession the property of his intestate. Section 3915 authorizes him to maintain actions in court for that purpose, or for other purposes when neces-

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sary. The argument of respondent in this regard is exceedingly hypercritical.

Numerous veiled suggestions appear in respondent's brief relating to matters outside the record. It is, perhaps, needless to say that such allusions and suggestions are improper, and can have no influence whatever upon the judgment of this court in determining the questions submitted for its consideration. It is a fundamental rule of practice that, as against a general demurrer, a pleading should be liberally construed. Applying that rule to the present case, we are of the opinion that the trial court erred in sustaining the demurrer and entering judgment dismissing the action, and for that reason the judgment must be reversed.

The cause is therefore remanded to the district court of Weber County, with instructions to said court to reinstate plaintiff's complaint, overrule the demurrer interposed thereto, permit the defendant to file an answer to said complaint upon such terms as may be just, and proceed with the hearing of said cause. Appellant to recover costs on appeal.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

LAKE SHORE DUCK CLUB v. LAKE VIEW DUCK CLUB et al.

No. 3073. Decided June 28, 1917. (166 Pac. 309)

1. **APPEAL AND ERROR—REVIEW—EQUITY CASE.** On appeal in an equity case, the Supreme Court has power to review the testimony to determine the facts and the equities of the parties, though its views conflict with the trial court's findings. (Page 79.)
2. **WATERS AND WATER COURSES—APPROPRIATION OF WATER—IRRIGATION FOR WILD FOWL—STATUTE.** Under Comp. Laws 1907, section 1288x6, as amended by Laws 1909, c. 62, and section 1288x16, as amended by Laws 1915, c. 83, providing that any person, etc., to acquire the right to use any public water in the state, shall take certain steps, etc., an appropriation of water cannot be made for the irrigation of unsurveyed, uninclosed, unoccupied public domain of the United States for the sole production of food for wild water fowl, since to effect a valid appropriation of water the beneficial use must be one that inures to the exclusive benefit of the appropriator subject to his complete control. (Page 80.)

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3. **WATERS AND WATER COURSES—APPROPRIATION OF WATER APART FROM LAND.** Water may be appropriated and used on the public domain, and such a right acquired thereby as will be recognized and sustained, though the appropriator never acquires title to the land; his right to the water will be upheld even after he is dispossessed of the land on which it was used, but in such cases some sort of possessory right, good as against everybody but the government, must exist in favor of the appropriator. (Page 81.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Lake Shore Duck Club against Lake View Duck Club, sometimes known as Lake View Gun Club and others.

Judgment for defendants. Plaintiff appeals.

AFFIRMED.

R. S. Farnsworth for appellant.

Geo. Halverson for respondent.

THURMAN, J.

This is an action by plaintiff to quiet its title to certain dams and ditches, water and water rights, of which it claims to be the owner, in Box Elder County, and for damages for the alleged wrongful interference therewith.

The complaint alleges the ownership and right of possession of said property, and states that the water was used on certain described lands for the propagation and growing of grasses, tules, rushes, and other vegetation suitable for feeding wild water fowl, and declares the same to be a beneficial use. The complaint then alleges the interference complained of, which consisted of placing obstructions in plaintiff's canal, diverting the waters thereof, and maintaining the same, to plaintiff's injury. Plaintiff prays for damages, and that its title to the water and water ditches be quieted, and for injunctive relief. The answer of the defendants admits the corporate existence of the plaintiff and defendant corporations, and denies the other allegations of the complaint. It further alleges, in substance, that the individual defendants and numerous other persons named therein are now, and for a long time have been, the owners of several parcels of land, particularly describing

them, and for more than thirty years prior to the commencement of the action have been the owners of the right to use all of the waters of Dix creek and Warm Springs creek, and during all of said time have, by dams and ditches and natural water courses running through said land, irrigated the same for the production of natural grasses growing thereon, for watering stock, forming duck ponds, and for other beneficial purposes. It is further alleged that these acts of defendants are the acts complained of in plaintiff's complaint; that the defendant corporation is, and for a long time has been, the lessee of the owners of said lands, and the individual defendants are employees of the defendant corporation. Defendants pray for a dismissal of the action.

The court found in favor of defendants. In finding No. 2 it finds that the plaintiff, on the 25th day of September, 1915, made an application in the office of the state engineer for a right to the use of unappropriated waters for irrigation purposes from September 1st to December 31st of each and every year of First Salt creek in Box Elder County, to be applied through a ditch on unsurveyed land comprising parts of sections 5, 7, and 8, in township 7 north, range 2 west, and sections 11 and 12, township 7 north, range 3 west, Salt Lake meridian, United States survey, aggregating 800 acres, said water to be applied for the purpose of propagating grasses, tules, rushes, and other vegetation suitable for feed for wild water fowl. Finding No. 2 further states, in substance, that notice of the application was published, and, no protest being made, the application was approved by the state engineer, and returned to plaintiff April 19, 1916.

Finding 3, in substance, states that at the time of making said application the plaintiff was not, never has been, and is not now, the owner of any part of said sections 6, 7, and 8, in township 7 north, range 2 west, or sections 11 and 12, in township 7 north, range 3 west, of the Salt Lake meridian. The court then finds the construction of a canal by plaintiff leading to the lands above described in 1915 and 1916, and the placing of a dam therein by the defendants by which the water was diverted and caused to flow down a natural water

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course to and upon the lands of the defendants, where the same was used for soil washing, the producing of natural grasses, pasturage, vegetation, and duck ponds, on the grounds occupied by the defendant Lake View Duck Club.

Finding 4 states, in substance, that during the time mentioned in the complaint, and prior to the diversion of the water by the defendants, all the waters of Salt creek flowing down to plaintiff's point of diversion were flowing to and upon said sections 6 and 7, which were unsurveyed lands, arid in character, but the water spread out tended to produce natural grasses, tules, rushes, and other vegetation suitable for wild water fowl; that said lands were and still are uninclosed public domain, no part of which has ever been tilled.

The other findings of the court relate solely to the diversion and use of the water by the defendants, the necessity therefor, and the conclusion of the court that the defendants rightfully committed the acts complained of; that the plaintiff was not damaged, and was not entitled to the water.

As the defendants seek only a dismissal of the action, with no prayer for equitable relief, we deem the foregoing statement sufficient, especially as the only question to be determined is, what, if any, relief is the plaintiff entitled to in view of the pleadings and facts disclosed by the record.

This is an equity case, and this court has the power to review the testimony for the purpose of determining what the facts are and the equities of the parties, even though its views are in conflict with the findings of the trial court. On the very threshold, however, of our investigation, the court finds itself confronted with a unique question,—an anomaly, perhaps, in the jurisprudence of the arid region. 1

Respondents, in their brief, assail the validity of the alleged appropriation relied on by plaintiff on the grounds that the lands to be irrigated are unsurveyed government domain, uninclosed, unoccupied, and uncultivated, and that the propagation of wild fowl thereon is not a beneficial use subject to private ownership. If this contention is right, every other question involved becomes wholly immaterial.

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The plaintiff, in pursuance of the provisions of Comp. Laws Utah 1907, section 1288x6, as amended in 1909 (Laws 1909, c. 62), made its application in the office of the state engineer for a right to the use of unappropriated water for the irrigation of certain lands, to wit, sections 6 and 7, township 7 north, range 2 west, and sections 1 and 12, township 7 north, range 3 west, Salt Lake meridian. It is stated in the application that the land is unsurveyed, and that the water is to be used for propagating grasses, tules, rushes, and other vegetation suitable for feed for wild water fowl. The application is in due form. Notice thereof was published as provided by law. No protest was filed, and the state engineer approved the application subject to the usual conditions which, as far as the record discloses, have been fully complied with.

It will be noted that the only purpose of this appropriation is the production of food for wild water fowl on unsurveyed lands of the public domain. The court found, as we have seen, that the lands were not only public and unsurveyed, but uninclosed and untilled. It also found that the plaintiff did not own them, nor any part of them, from all of which, if the court's findings are justified by the evidence, we may draw the legitimate conclusion that plaintiff did not, and does not, own even a possessory right to any of the lands except the small spot occupied by its clubhouse which, for the purposes of this case, is wholly immaterial. These findings of the court as to the nature, character, and condition of the land upon which the water was to be used are not seriously questioned. If they are questioned at all, we are satisfied that they are sustained by a decided preponderance of the evidence.

The vital question, then, to be determined is, can an appropriation of water be made under the laws of this state for the irrigation of unsurveyed, uninclosed, unoccupied public domain of the United States for the sole production of food for wild water fowl, which, when propagated and 2 raised, must, of necessity be as accessible to capture, destruction, and appropriation to use, by any other person who may see fit to hunt upon the land, as to the person who went through the form of making an appropriation. To our

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minds it is utterly inconceivable that a valid appropriation of water can be made under the laws of this state, when the beneficial use of which, after the appropriation is made, will belong equally to every human being who seeks to enjoy it. It would be little short of an anomaly in any system of jurisprudence that would authorize the restraining of a person from diverting water used solely for the propagation of ducks, and then deny injunctive, or any, relief against the same person if he should enter upon the land irrigated, shoot the ducks ad libitum, and appropriate them to his own use. If the beneficial use for which the appropriation is made cannot, in the nature of things, belong to the appropriator, of what validity is the appropriation? The very purpose and meaning of an appropriation is to take that which was before public property and reduce it to private ownership. The whole procedure under our statute, relating to an appropriation of water, is a series of steps to that end. The section of the Compiled Laws above referred to commences:

"Any person, corporation, or association, to hereafter acquire the right to the use of any public water in the state of Utah shall," etc.

Then the successive steps are stated down to and including the issuing of the final certificate of ownership as provided in section 1288x16, as amended in 1915 (Laws 1915, c. 83). The latter part of that section declares:

"The certificate so issued and filed shall be prima facie evidence of the appropriator's right to the use of the water in the quantity, for the purpose and during the time mentioned therein, and shall be evidence of such right."

It certainly must be conceded that the purpose of the law is to endow the appropriator of the water with all the insignia of private ownership. The certificate is his deed; his evidence of title, good, at least against the state, for all it purports to be, and good as against every one else who cannot show a superior right.

The authorities cited by appellant in support of the right to appropriate water to be used on the public domain are not controverted by us, but they are not in point. It is almost a matter of common knowledge, even among

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laymen that water may be appropriated and used on the public domain, and such a right acquired thereby as will be recognized and sustained, even though the appropriator never acquires title to the land. His right to the water may be respected and upheld even after he is dispossessed of the land upon which the water was used; but in all such cases it will appear that some sort of possessory right, good as against everybody but the government, existed in favor of the appropriator. Such is the case with the authorities cited by appellant.

It is manifest in this case that the plaintiff has no possessory right whatever to the lands upon which the water is to be applied. It is therefore impossible for it to acquire the exclusive enjoyment of the use to which the water is applied. It is not alone the fact that the lands are public domain, unsurveyed, uninclosed, unoccupied and untilled, but the fowl to be fed on the land are wild water fowl—*feræ naturæ*, as distinguished from domestic fowl which might possibly be the subject of private ownership even though propagated on the public domain.

We have searched in vain for any authority in support of appellant's claim of a valid appropriation of the water in controversy. The beneficial use stated in the application is not in question. We are not disposed to hold that any use of water tending to supply man or domestic animals with food is not beneficial. But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be one that inures to the exclusive benefit of the appropriator and subject to his complete dominion and control. As the use in this case is not of that character, we are forced to the conclusion that plaintiff's attempted appropriation is invalid, and that defendants committed no legal wrong in the acts complained of in plaintiff's complaint.

As these views are decisive of all the assignments of error the judgment of the trial court is affirmed, with costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

Appeal from Salt Lake County, Third District

PEALE v. CLARK

No. 3009. Decided July 10, 1917. (166 Pac. 981.)

1. **APPEAL AND ERROR—UNDERTAKING ON APPEAL.** An undertaking is sufficient as an undertaking on appeal under Comp. Laws 1907, section 3306, its terms being broad enough to constitute it such, though they are also broad enough to constitute it an undertaking to stay execution under section 3307, and it is for a greater amount than required by section 3306. (Page 84.)
2. **SET-OFF AND COUNTERCLAIM—PARTNERSHIP TRANSACTIONS.** A counterclaim, alleging that the parties and others executed a deed for water rights belonging to them, that the purchase price was \$1,000, that the deed was delivered by plaintiff, and he received the full price, and has kept and applied it to his own use, and that plaintiff was owner of half of the water rights, and that half the purchase is due and owing him from plaintiff, does not show that the owners were partners, and so is not demurrable as on a claim arising out of unsettled partnership accounts. (Page 87.)
3. **APPEAL AND ERROR—REVERSAL OF JUDGMENT ON DEMURRER—DISPOSITION OF CASE.** Where the ground of a special demurrer to a counterclaim is in the nature of abatement merely, the court, on reversing the judgment sustaining it, will not enter or direct a judgment for defendant on the merits on the counterclaim, unless it clearly appears that the demurrer was frivolous, or that no defense to the counterclaim could in any event be made.¹ (Page 89.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by R. H. Peale against H. P. Clark.

Judgment for plaintiff on demurrer to counterclaim. Defendant appeals.

REVERSED and REMANDED with directions.

M. M. Warner for appellant.

W. I. Snyder for respondent.

RESPONDENT'S POINTS

It is settled almost everywhere, that the counterclaim which is available to a defendant must be between him and the

¹ *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958.

plaintiff (C. L. U. 2969) and not between him and plaintiff and others, as in this case: (34 Cyc. pp. 712, section k. 715, section 2. *Loundes v. Bank* (Conn.), 66 Atl. 514). In *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627, it was held that a partnership transaction, or a right growing out of one, was not available to a defendant as a counterclaim against a plaintiff interested in the partnership. One of the syllabi fully borne out is as follows:

“Where a counterclaim set up is due, if at all, as a partnership account against sundry persons besides plaintiff, and until an accounting, would not be the subject of an action of law, it is not a counterclaim ‘existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action,’ within the purview of Code Civil Proc. Cal. 438, and is not valid.”

The same rule was applied by the same court in many other cases to which we invite attention: *Haskell v. Moore*, 29 Cal. 437; *Hook v. White*, 36 Cal. 299; *Lane v. Turner*, 141 Cal. 396, 46 Pac. 290; *Roberts v. Donovan*, 70 Cal. 108, 9, P. 180, and cases.

FRICK, C. J.

The plaintiff commenced this action against the defendant to recover upon a promissory note. The defendant answered the complaint, admitting the indebtedness evidenced by said note, and set up a counterclaim, in which he averred that the plaintiff was indebted to him in a sum in excess of the amount claimed by the plaintiff. The plaintiff interposed a demurrer to the counterclaim: (1) That the facts stated are insufficient; (2) that the matter set forth as a counterclaim “is not a proper subject of counterclaim in this action, for the same is in the nature of an action for an accounting and therefore equitable”; and (3) that the counterclaim is ambiguous, uncertain, etc. The court sustained the demurrer (but upon what ground the record does not disclose) and entered judgment for the plaintiff for the amount of the promissory note. Defendant appeals.

Before proceeding to a consideration of the court’s ruling on the demurrer respecting the sufficiency of the

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counterclaim, etc., we are required to determine a motion interposed by the plaintiff to dismiss the appeal.

“The undertaking on appeal must be in writing, and must that no undertaking on appeal has been executed and filed as required by Comp. Laws 1907, section 3306. That section reads:

“The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.”

Section 3307 also provides for an undertaking to stay execution in case the appellant desires to prevent the enforcement of the judgment pending the appeal. It is not necessary, however, to quote from or to refer specially to that section.

The defendant in this case caused to be executed, and in proper time filed, an undertaking with proper sureties as required by our statute. The plaintiff, however, insists that the undertaking executed and filed is in fact an undertaking to stay execution under section 3307, and not an undertaking on appeal which is required by section 3306, *supra*. While it is true that the terms of the undertaking filed in this case are broad enough to operate as a stay of execution, yet, in our judgment, its terms are also broad enough to constitute a sufficient undertaking on appeal. There is nothing in the statute which prohibits an appellant to cover the provisions contained in both sections aforesaid in one undertaking, if he so elects; and, if he in fact causes to be executed and filed an undertaking that is sufficient to comply with the requirements of section 3306, his appeal ought not to fail simply because he has included in the undertaking more than is made necessary by that section. In the undertaking that is assailed by the plaintiff the sureties bound themselves as follows:

“That if the judgment appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or

the part of such amount as to which the judgment or order is affirmed if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur of the Supreme Court in the court from which this appeal is taken, then in that event, judgment may be entered on motion of the respondent in his favor against the sureties herein for such amount together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal."

Now, all that is required by section 3306 is that the appellant cause to be executed an undertaking "to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding \$300." It is true that in the undertaking in question the amount is in excess of \$300; but surely that is no reason why the sureties are not bound, and hence affords no cause for complaint on the part of the plaintiff.

Plaintiff, in support of his motion to dismiss the appeal for the reason stated, has cited and relies on *Hill v. Finnigan*, 54 Cal. 493, *Duffy v. Greenebaum*, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323, and *Zane v. De Onativia*, 135 Cal. 440, 67 Pac. 685, in which cases, he contends, the Supreme Court of California, under a statute like ours, has sustained his contention. We have examined those cases, and in the case of *Duffy v. Greenebaum*, supra, the Supreme Court of California, by a divided court, apparently held that if an appellant files an undertaking which covers both sections, such an undertaking is insufficient as an undertaking on appeal. We say the court has apparently so held for the reason that the terms of the undertaking there in question are not set forth, and from what is said in the opinion, and especially in the dissenting opinion, we conclude that the holding of the court is to that effect. As before stated, however, and such is clearly the view expressed in the dissenting opinion filed in that case, if an undertaking executed and filed is sufficient to meet the requirements of section 3306, the appeal should not be dismissed. The other California cases cited upon this point add nothing to what

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has been said. We only desire to add here that while it is our duty to protect and enforce the rights of all litigants, yet if an appellant has, in substance and effect, complied with the provisions of section 3306, and has thus protected the rights of his adversary, as contemplated by that section, the appeal should be upheld. The right of appeal is a constitutional one in this state and should not be frittered away by adhering too strictly to the letter without due regard for the spirit and purpose of the statute. In our opinion defendant has complied with both the purpose and the spirit of the statute, and the rights of the plaintiff being protected and enforceable in case the appeal were for any reason dismissed, the motion to dismiss the appeal should be, and it accordingly is, denied.

We thus proceed to determine the merits of plaintiff's demurrer to the counterclaim. The defendant in his counterclaim, in substance and effect, averred that on a day named the defendant, the plaintiff and others executed a certain deed of conveyance for certain water rights be- 2
longing to the defendant, the plaintiff and others; that the purchase price to be paid for said water rights by the grantees in such deed was the sum of \$10,000; that after said deed had been executed by the grantors the same was given into the possession of the plaintiff, and he delivered the same to the grantee, and that he received the full purchase price of said water rights from the grantee in said deed, and has kept and applied the same to his own use; that the defendant was the owner of one-half of said water rights, and that one-half of the purchase price thereof as aforesaid is due and owing to him from said plaintiff. The defendant prayed judgment for one-half of said purchase price, to wit, the sum of \$5,000, less the amount found due to the plaintiff on said promissory note.

There can be no doubt that the counterclaim states a cause of action against the plaintiff. Plaintiff's counsel, however, insists that the claim set forth by the defendant in the counterclaim "is not a proper subject of counterclaim" because, as he contends, it arises out of a partnership transaction. It is elementary that a demurrer, whether general or special, can reach no defects save such as appear upon the face of the

pleading to which it is directed. The question, therefore, is, In what way does it appear from defendant's answer that the counterclaim therein set forth arises out of a partnership transaction? The basis for such a contention is that the defendant avers that the water rights which were conveyed by the deed mentioned in the counterclaim belonged to himself, to the plaintiff, and to "others." This does not necessarily imply that the owners of the water rights were "partners" as that term is generally understood. Much less does it imply that the claim arises out of unsettled partnership accounts which existed at the time this action was commenced as between the plaintiff, the defendant, and the "others." Nor does it necessarily follow that the other owners of the water rights which were sold are necessary parties to this action, or that they had any present interest whatever when the action was commenced in the \$5,000 claimed by the defendant as one-half of the purchase price of said water rights. Indeed, the defendant alleged that he was the owner of one-half of the water rights conveyed as aforesaid, and that by reason of such ownership he was entitled to one-half of the purchase price amounting to \$5,000, which was retained by the plaintiff and converted to his own use. Those facts, however inartificially pleaded—and it must be conceded that the pleading is inartificially drawn—are admitted to be true by the demurrer, and, if true, the defendant's claim should prevail. For aught that is made to appear the plaintiff may have paid the shares of the purchase price belonging to the "others" named in the counterclaim, and hence, according to defendant's allegations, no one, except the defendant, has a right to the \$5,000, which is one-half of the purchase price of the water rights aforesaid. Whatever rights the plaintiff alone may have as against that part of the defendant's claim certainly may be settled in this action. Why, then, should the defendant not be permitted to set up his claim in this action? If there is any legal reason why such may not be done, it certainly does not appear from the pleadings as they now stand.

Plaintiff's counsel has, however, cited cases in which he contends it is held that unsettled partnership accounts are not a proper subject of counterclaim in an action at law. The

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cases specially relied on are *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627, *Haskell v. Moore*, 29 Cal. 439, *Hook v. White*, 36 Cal. 299, *Lane v. Turner*, 114 Cal. 396, 46 Pac. 290, and *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599. Neither *Hook v. White* nor *Roberts v. Donovan* have any bearing upon the question. In *Wood v. Brush* the Supreme Court of California, in passing upon the question, in 72 Cal. at page 226, 13 Pac. at page 628, said:

“The counterclaim set out in the supplemental pleading is clearly due, if at all, as a partnership account against sundry persons besides plaintiff, and, until an accounting is had and a balance struck, is not the subject-matter for an action at law. It is not, therefore, a counterclaim ‘existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action within the meaning of section 438 of the Code of Civil Procedure.’ ”

To the same effect are the decisions in *Lane v. Turner*, supra, and *Haskell v. Moore*, supra.

As we have pointed out, however, there is nothing contained in the defendant's counterclaim which brings it within the rulings of those cases. It may therefore be conceded that the decisions by the Supreme Court of California are right, but, notwithstanding that, have no controlling influence here.

The defendant's counsel, however, also insists that, in view that a cause of action is stated in the counterclaim, and that plaintiff's demurrer should have been overruled, and that plaintiff, nevertheless, stood upon his demurrer without interposing any defense to the counterclaim, therefore 3 we should enter or direct a judgment to be entered in favor of the defendant upon the counterclaim for the amount claimed therein, less the amount of plaintiff's promissory note in case that we overrule the demurrer. In support of his contention defendant's counsel cites *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958. In that case, in an action for specific performance of a contract, a demurrer was interposed to the complaint, which was sustained by the trial court. The plaintiff elected to stand on his complaint, and judgment was entered against him, dismissing the same, and he appealed to this court. This court held that the complaint stated a cause of action, and that the demurrer should have been overruled,

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and further held that, in view that the defendant interposed no defense to the complaint, except the demurrer by which the facts stated in the complaint were admitted, therefore the plaintiff was entitled to judgment for specific performance as prayed for in the complaint. On rehearing, however, the opinion was modified so as to permit the defendant to interpose a defense to the complaint, and the cause was remanded to the district court for that purpose. The decision in that case, so far as we are aware, has never been followed, nor has it been overruled, not directly at least. The question, therefore, is, Should the original opinion in that case be followed in this one? We think not. It should not be overlooked that in this case the principal ground of demurrer, and the one argued in this court, was that the matter set up in defendant's answer as a cause of action against the plaintiff was not a proper subject of counterclaim. While it is true that the facts pleaded in the counterclaim were admitted by the demurrer, yet it is also true that the ground of demurrer was in the nature of abatement merely. That is, if the trial court's ruling on the demurrer were affirmed by this court, the facts pleaded in the counterclaim as a cause of action against the plaintiff would not be adjudicated, but the cause of action would continue to exist in favor of the defendant and against the plaintiff as if no demurrer had been interposed. All that would have been adjudicated, therefore, was that the cause of action pleaded in the counterclaim was not pleadable against the plaintiff in this action, and not that the defendant had not stated a cause of action. While it is true that in this jurisdiction matters in abatement and matters in bar must be set forth in the same answer, yet it is also true that matters in abatement, where the defects appear on the face of a pleading, may be reached by special demurrer as was done in this case by plaintiff's counsel. When, therefore, a special demurrer is interposed which, if sustained, would merely abate an action or cause of action, we do not think that if such a demurrer is overruled the party against whose pleading the same was directed should be entitled to judgment on the merits, even under the broad rule first announced in *Gammon v. Bunnell*, supra. Nor do we think that in case a

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demurrer is sustained by the trial court, which is ultimately held bad by this court on appeal, a judgment should be entered upon the merits against the party interposing the demurrer, except it is clearly made to appear that the demurrer was frivolous or that no defense could, in any event, be made to the cause of action against which the demurrer was directed. It is elementary, in this jurisdiction at least, that either party may interpose a demurrer to invoke the judgment of the trial court respecting the sufficiency of any pleading, and that if the pleading is found sufficient, the demurrant may, on proper terms, and within a reasonable time, be permitted to interpose his defense upon the facts, if he have any. Why should a party be deprived of his right to interpose a defense upon the facts, so long as, in the opinion of his attorney, no cause of action is stated in the pleading demurred to? And why may not a party, if done in good faith, in this court on appeal test the sufficiency of a pleading by demurrer, as well as in the trial court, without being deprived of the right to interpose a defense as to the facts if he have one? While courts should not permit litigants to interpose frivolous demurrers, or merely for delay, yet upon the other hand, they should not deprive either party of the right to defend upon the merits merely because he, in good faith, may have misjudged the law upon a given point by interposing a demurrer which the court holds to be not well taken. We are satisfied that the demurrer was interposed in good faith in this case, and that the plaintiff should be given an opportunity to present his defense to the counterclaim if he have any.

We are of the opinion that the district court erred in sustaining plaintiff's demurrer and in entering judgment for him. The judgment is therefore reversed, and the cause is remanded to the district court of Salt Lake county, with directions to overrule the demurrer and to permit either or both parties to file additional pleadings and to proceed with the cause in accordance with the foregoing opinion. Defendant to recover costs on appeal.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

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In re HONE'S ESTATE

No. 3058. Decided July 26, 1917. (166 Pac. 990.)

TAXATION—INHERITANCE TAXES—COMPUTATION—STATUTES—CONSTRUCTION. Under Comp. Laws 1907, section 1220x, as amended by Laws 1915, c. 98, as to the assessment of inheritance taxes, an estate worth in excess of \$25,000 must be assessed 3 per cent. upon the difference between \$10,000 and \$25,000 or \$15,000, and 5 per cent. upon the balance, and not 3 per cent. in gross upon the entire estate, though after the deduction of the \$10,000 exemption, the balance of the estate is not worth in excess of \$25,000.

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Proceedings for assessment of inheritance tax upon the Estate of Joshua Hone, Deceased.

From decree rendered, the State appeals.

REVERSED and REMANDED, with directions.

Dan B. Shields, Attorney General, and *O. C. Dalby* and *James H. Wolfe*, Asst. Attys. Gen. for the State.

Harvey Cluff for respondent.

FRICK, C. J.

One Joshua Hone, a resident of Provo, Utah county, this state, died on the 5th day of October, 1915. It is agreed that said Hone died possessed of an estate of the gross value of \$31,264.15; that the debts, taxes, funeral and other expenses to be deducted from the gross value of the estate amounted to the sum of \$2,309.97, and that the net value of the estate amounted to \$28,954.18. The only question involved on this appeal is the amount of inheritance tax that may legally be assessed against said estate under Comp. Laws 1907, section 1220x, as amended by Laws Utah 1915, p. 153. That section reads as follows:

“All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall

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pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after the death of the grantor, vendor, or donor, to any person in trust or otherwise, shall be subject to the following tax, after the payment of all debts, for the use of the state: Three per cent. of its market value in excess of \$10,000.00 and not exceeding \$25,000.00, and five per cent. of its market value in excess of \$25,000.00; and all administrators, executors, and trustees, and any such grantee under conveyance, and such donee under a gift made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them respectively, except as herein otherwise provided, with lawful interest as hereinafter set forth, until the same shall have been paid. The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid. In determining the amount of tax to be paid under the provisions of this section, after the payment of all debts, the sum of \$10,000.00 shall be deducted from the entire estate and the tax shall be computed and paid on the entire remainder; and the court shall determine the amount of tax to be paid by the several devisees, legatees, grantees, or donees of the decedent."

The district court construed and applied the provisions of that section as follows: First, it deducted from the gross value of the estate, amounting to \$31,264.15, the debts, taxes, funeral and other expenses as aforesaid, leaving a net value of \$28,954.18. The court then deducted the \$10,000.00 exemption provided by the statute which left an amount taxable under the statute of \$18,954.18. That amount being less than \$25,000.00, the court taxed the whole thereof at the rate of three per cent., which amounted to an inheritance tax of the sum of \$568.62 against said estate. The district court, therefore, ordered that amount to be paid to the estate as an inheritance tax before making distribution thereof. The Attorney General, who appears for the state on this appeal, insists that the district court erred in its construction of the statute and in computing the inheritance tax due to the state from said estate, and that under the provisions of the statute the state

is entitled to a larger amount of taxes from said estate. The Attorney General contends that under the provisions of the statute the inheritance tax due to the state from said estate should be computed as follows: First deduct from the gross value of the estate the amount of the debts, taxes, funeral and other expenses, as was done, which gives a net value of \$28,954.18, from which then deduct the \$10,000 exemption which fixes the taxable value of the estate at the sum of \$18,954.18. It is contended that that sum should be taxed, and that \$15,000 thereof should be taxed at the rate of three per cent. and the remaining \$3,954.18 should be taxed at the rate of five per cent. That would impose a tax of three per cent. on \$15,000, which would amount to \$450, and would impose an additional tax of five per cent. on the remaining \$3,954.18, which would amount to the sum of \$197.70, or a total tax of \$647.70, or \$79.08 in excess of what the court allowed the state as an inheritance tax.

While the amount involved in this case is not large, yet it will readily be seen that if the construction the court placed on the statute shall prevail, then, in the long run, the rights of the state may be affected to a considerable extent. The question, therefore, recurs, What, under the statute, is the correct amount upon which the three per cent. tax shall be assessed in the event the estate exceeds the \$10,000 exempted by the statute? If that amount be once ascertained, there can be no escape from what follows. As the writer views the statute, that amount is so clearly fixed by it that no construction is either necessary or permissible. The controlling part of the statute provides that all estates—

“shall be subject to the following tax, after the payment of all debts, for the use of the state: Three per cent. of its [the estate's] market value *in excess of \$10,000 and not exceeding \$25,000.00*, and five per cent. of its market value in excess of \$25,000.00.” (Italics ours.)

Now, according to all known systems of notation, there is, there can be, but one possible number between the extremes named in the statute, namely, 10,000 and 25,000, and that number is 15,000. Therefore, if an estate exceeds the net value of \$10,000, and reaches the precise amount or net value

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of \$25,000, the amount that is assessable under the statute is precisely \$15,000, no more, no less. At what rate or per cent. is the \$15,000 assessable? Clearly and manifestly at the rate of three per cent., since there can be no other rate under the statute. In case, however, the estate exceeds a net value of \$25,000, then at what rate or per cent. is the excess over \$15,000 assessable? Again there can be but one correct answer, which is, the rate of five per cent. To my mind, therefore, it is palpably clear that the only sum that is taxable at the rate of three per cent. under the statute is that sum which remains after deducting \$10,000 from \$25,000, which is \$15,000. The statute, in explicit terms, fixes the sum that is taxable at the rate of three per cent. as the sum which is obtained from any sum which is "in excess of \$10,000.00 and not exceeding \$25,000.00." As before stated, there is but one possible sum between those two extremes, and that is the sum of \$15,000. As \$10,000 is the limit of exemption, so \$15,000 is the limit upon which the three per cent. tax may be levied. Any estate, therefore, the net value of which does not exceed \$10,000, is entirely exempt. Every estate which has a net valuation of more than \$10,000, and not exceeding \$25,000, is taxable at the rate of three per cent. on the difference between \$10,000 and \$25,000, which is \$15,000, and every estate, the net value of which exceeds \$25,000 is taxable at the rate of five per cent. for every dollar in excess of \$25,000.

It is contended, however, on the part of the estate that what follows later in the statute must also be considered in connection with what I have specially quoted, and that what follows determines the amount of the tax. The provision just alluded to reads as follows:

"In determining the amount of the tax to be paid under the provisions of this section, after the payment of all debts, the sum of \$10,000.00 shall be deducted from the entire estate and the tax shall be computed and paid on the entire remainder; and the court shall determine the amount of tax to be paid by the several devisees, legatees, grantees, or donees of the decedent."

The most elementary and the most important rule of construction is that in case construction becomes necessary, then every word and every clause in a statute which is not manifestly surplusage must be given its ordinary and usual meaning and effect. If, therefore, we apply that rule in this case, what follows? There is but one clause in the statute which classifies the estates and fixes the rate of taxation to be computed upon the values thereof. That clause is the one first above quoted. In the last clause quoted there is absolutely nothing which either classifies or fixes the rate of taxation. All that is there said is that the \$10,000 shall be first deducted from the whole estate "and the tax shall be computed and paid on the entire remainder." What tax? Clearly, the tax specified in that part of the section which fixes the rate that shall be imposed. What is that rate? As I have shown, it is three per cent. upon any estate having a net value in excess of \$10,000, and not exceeding \$25,000, which sum is, necessarily, \$15,000, and upon all the remainder of the estate the rate is to be five per cent. Now what is said in the clause last quoted is that the entire estate in excess of \$10,000 shall be taxed, but it leaves the classification and the rate of taxation precisely as it is originally fixed in the statute in that part which I have first quoted in this opinion.

There is therefore no escape from the conclusion that the district court erred in taxing the entire value of the estate in question which is in excess of \$10,000 at the rate of three per cent. The court should have assessed the value in excess of \$10,000 and not exceeding \$25,000, which is the sum of \$15,000, at the rate of 3 per cent. and the remainder of the estate at the rate of five per cent. The judgment is therefore reversed, and the cause is remanded to the district court of Utah county, with directions to set aside its conclusions of law and order requiring the estate to pay to the state a tax of \$568.62, and in lieu thereof to enter an order or judgment requiring the estate to pay to the state a tax of \$647.70. The costs of this appeal to be paid out of the funds of the estate.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

Appeal from Cache County, First District

BOARD OF EDUCATION OF CACHE COUNTY SCHOOL

DIST. et al v. DAINES

No. 3055. Decided July 26, 1917. (166 Pac. 977.)

1. **STATUTES—CONSTRUCTION.** While all statutes in *pari materia* should be construed together, yet where two statutes relating to the same subject-matter are repugnant, and cannot be reconciled, the later must be accepted as the legislative will. (Page 100.)
2. **TAXATION—SCHOOL TAXES—COMPENSATION.** Comp. Laws 1907, section 616x3, first enacted in Laws 1903, c. 131, declares that special taxes of school district shall be assessed and collected as provided by law, and that the school district shall pay to the county one-half of 1 per cent. on the amount of taxes collected in full for the services and compensation of the county in assessing and collecting such taxes. Comp. Laws 1907, section 1891x27, first enacted in Laws 1905, c. 107, as amended by Laws 1911, c. 135, Laws 1913, c. 96, and Laws 1915, c. 78, declares that the board of education shall, on or before the 1st day of May in each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the succeeding year, and to defray the interest on bonds, etc., which taxes shall be collected by the county treasurer as other taxes are collected, but without additional compensation for assessing and collecting, and he shall pay the same to the treasurer of the board. *Held* that, as the latter statute must be treated as the legislative will on the subject, taxes assessed thereunder cannot be treated as special taxes on which the school district is liable to pay a percentage to the county for the cost of assessment and collection. (Page 100.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by the Board of Education of Cache County School District and Joseph Campbell, Treasurer thereof, against George S. Daines.

Judgment in part for defendant. Plaintiffs appeal.

REVERSED and REMANDED, with directions.

J. C. Walters for appellant.

A. E. Bowen for respondent.

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APPELLANT'S POINTS

It is true that repeals by implication are not favored, but where there is a positive repugnancy between the provisions of two statutes the former in point of time is repealed by implication to the extent of such repugnancy. Or where it is apparent that the legislature intended to cover the particular subject by a later enactment, and such later act is inconsistent with the provisions of a former act, the former act is repealed without express words of repeal. *Bartch v. Meloy*, 8 Utah 424; *Hudson v. Freed*, 10 Utah 31; *In re Gannett*, 11 Utah 283; *Judge v. Spencer*, 15 Utah 242.

FRICK, C. J.

The board of education of Cache county school district, hereinafter called plaintiff, commenced this proceeding in the district court of Cache county to compel the defendant, as treasurer of Cache county, to pay to the treasurer of the plaintiff the sum of \$1,863.52 as taxes collected by the defendant for said school district. In the application for the writ of mandate it is, in substance, alleged that the taxable property of said school district for the year 1915 was more than \$5,000,000 and less than \$8,000,000; that on the 1st day of May, 1915, the plaintiff prepared a statement and estimate of the amount of money that would be necessary for the support and maintenance, and for all other purposes, of the schools under its charge for the school year commencing July 1, 1915, and that plaintiff caused said statement and estimate to be certified to the county commissioners of Cache County as provided by law; that the amount required for all school purposes, and which was certified as aforesaid, was \$99,408; that in accordance with the provisions of law a tax of 12½ mills on the dollar was levied on the taxable property of said school district in order to obtain the amount necessary for the purposes aforesaid for the year 1915; that George S. Daines, the defendant, in the year 1915, and at the commencement of this action, was the treasurer of said Cache County, and as such he has collected said taxes for said year 1915; that it was the duty of said treasurer to pay the amount col-

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lected by him promptly as collected to the treasurer of the plaintiff; and that he has refused and failed to do so, but has withheld and still withholds the sum of \$1,863.52 of the amount collected by him as school taxes for the year 1915 from the plaintiff. The plaintiff therefore prayed judgment that the defendant, as treasurer as aforesaid, be required to pay said amount to the treasurer of the plaintiff, or to show cause why he refuses to do so.

An alternative writ of mandate was duly issued by the district court, and the defendant filed his answer thereto in due time, in which he, in substance, claimed the right to withhold said \$1,863.52, and the whole thereof, as compensation for collecting the school tax for the year 1915, amounting to \$99,408, as before stated. Upon a hearing the district court held that the defendant was entitled to retain one-half of 1 per cent. of said \$99,408, which amounted to \$497.04, as compensation for collecting said taxes, and required him to pay over to the plaintiff the sum of \$1,366.48; that being the difference between the \$1,863.52 demanded by the plaintiff and the \$497.04 allowed the defendant for compensation as aforesaid. The defendant, in his answer, had, however, also claimed the right to deduct one-half of one per cent. from the taxes that were levied for the four years immediately preceding the year 1915, and to retain said one-half of one per cent. out of said \$1,863.52. The court, however, disallowed the defendant any compensation for the preceding years aforesaid.

The plaintiff appeals from the judgment, and insists that the district court erred in allowing defendant any amount for compensation; and the defendant assigns cross-errors, in which he contends that the district court erred in not permitting him to deduct also one-half of one per cent. for the taxes which he collected for the four years immediately preceding the year 1915 out of said \$1,863.52. The correctness of the district court's judgment depends upon the construction that shall be given to certain sections of our statute relating to the collection of school taxes. While counsel for the respective parties have referred to a large number of sections

of our statutes, yet it is not necessary for us to consider all of the sections referred to by them, in order to arrive at a correct solution of the questions involved in this controversy, and we shall therefore refer only to the sections which, in our judgment, are controlling.

The statement and estimate referred to in plaintiff's application for the writ, and all of the taxes in question in this proceeding, were certified, levied, and collected under the provisions of Comp. Laws 1907, section 1891x27, 1, 2 as amended by Laws Utah 1911, p. 266, Laws Utah 1913, p. 184, and Laws Utah 1915, pp. 98 and 191. That section, as in force when the taxes in question were certified, levied, and collected, so far as material here, reads as follows:

"The board of education shall, on or before the first day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the first day of July next thereafter, and for the purchase of school sites and the erection of school buildings; also the amount necessary to pay the interest accruing during such year and not included in any prior estimates on bonds issued by the district; also the amount of sinking fund necessary to be collected during such year for the payment and redemption of said bonds: Provided, that in the year 1915, the time for furnishing the statement and estimate above named, shall be extended to the second Monday in July. The board of education shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the district is situated, and the board of county commissioners of the county in which the district is situated shall at the time of making the annual levy of other county taxes, levy such per cent. as shall, as nearly as may be, raise the amount required by the board, which levy shall be uniform on all property within said district as returned on the assessment roll, and the said county officers are hereby authorized and required to place the same on the tax roll. *Said taxes shall be collected by the county treasurer*

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as other taxes are collected but without additional compensation for assessing and collecting, and he shall pay the same to the treasurer of the board, promptly as collected, who shall hold the same subject to the order of the board of education."
(Italics ours.)

That section also imposes certain limitations and provides other conditions which are not material here. So far as we have quoted the statute, there is practically no difference in the language, and certainly none in its substance, between its first enactment in 1905 (Laws Utah 1905, p. 136), and the last enactment in 1915, which we have quoted (Laws Utah 1915, p. 98). During all of those years the statute continued the statement we have italicized in the foregoing quotation. The defendant, however, relies upon Comp. Laws 1907, section 616x3, which provides:

"Special taxes of school district shall be assessed and collected as already provided by law: Provided, that each school district shall pay to the county in which it is situated one-half of one per cent. on the amount of taxes collected, and such payments shall be in full for the services and compensation of the county in assessing and collecting and paying over said taxes."

That section was originally passed in 1903 (Laws Utah 1903, 184). As it appears from that section, the right to compensation is strictly limited to "special taxes of school districts." While there are various provisions in our statutes authorizing the taxpayers of the several school districts to vote special taxes for certain purposes, yet, for reasons hereinafter appearing, we are not now concerned with any of those provisions. All that we are now required to determine is whether the taxes in controversy here are special. The district court held that all of the taxes enumerated in section 1891x27, *supra*, are special, and hence held that the defendant was, by law, authorized to deduct therefrom the one-half of one per cent. mentioned in section 616x3, *supra*. The district court, however, also held that, inasmuch as the defendant had voluntarily, and without protest, paid over the one-half of one per cent. for the four years immediately preceding the

year 1915, for that reason he could not retain the amount accruing for the preceding years out of the taxes for 1915, but could only retain the one-half of one per cent. for that year. In our opinion, the ruling of the district court, that the taxes enumerated in section 1891x27, and which are in question here, are special, and hence subject to the one-half of one per cent. mentioned in section 616x3, is clearly erroneous. By reference to section 1891x27, which we have quoted above, it will be seen that it is made as clear as the English language can make it that no compensation of any kind, or in any amount, is allowed to the county treasurer for collecting the taxes therein enumerated. The statute imposed the duty upon the plaintiff to make the statement and estimate of the amount of money that would be necessary for the purposes stated in the statute and to certify the same to the county commissioners so that the proper levy could be made. Plaintiff discharged its duty in that regard, and it seems the county commissioners did likewise. After that was done it became the duty of the defendant as the treasurer of Cache County to collect said taxes. The statute contains the special provision which we have italicized. Could a mandate to the several county treasurers be made more direct and more explicit respecting their duty and to prevent them from exacting compensation? To what taxes does the foregoing mandate refer? Manifestly to all the taxes that are enumerated in the section, which enumeration precedes the mandate. The statement and estimate certified by the plaintiff contained no other taxes except such as are mentioned in the statute, and all of which are included in the term "said taxes."

The district court, in arriving at the conclusion before stated, must have been controlled entirely by what is said in section 616x3 regarding the compensation allowed for collecting special taxes. How the court arrived at the conclusion, however, that all of the taxes mentioned in section 1891x27 are special, we are unable to understand. True it is that, as already stated, there are other provisions of our statutes authorizing the taxpayers of the several school districts to

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vote special taxes. It is also true that it is a cardinal canon of construction that in order to determine the intention and effect of a particular statute, or a particular provision, all other statutes and provisions relating to the same subject and which are in *pari materia* must also be considered. That rule, like all other rules, however, also has its exceptions. For example: Where there are two statutes or provisions, that are manifestly repugnant to each other and cannot be reconciled, then the courts must look to and enforce the latest expression of the legislative will as found in the statute last enacted. When, therefore, as is the case here, the Legislature has so clearly manifested its intention to exempt certain enumerated things from the operation of an existing statute by a later one, the courts have no alternative save to enforce the intention of the Legislature, as expressed in the later statute, by enforcing it. Whatever, therefore, may be said respecting the right to vote special taxes and the right of the several county treasurers to deduct the one-half of one per cent. mentioned in section 616x3, yet it is too plain for controversy that that section can be given no effect respecting the taxes specially enumerated in section 1891x27, since by that section the treasurers are expressly prohibited from deducting anything for compensation.

We have less hesitancy in arriving at the foregoing conclusion for the reason that the question resolves itself, very largely at least, to a mere matter of bookkeeping. In the long run the taxpayers of the particular county must provide the money for the schools, as well as defray the expenses incident to the collection of all of the taxes. School funds in this state, in one sense, are deemed trust funds, and, under our laws, are required to be strictly devoted for school purposes. It is easy to perceive, therefore, why the Legislature should direct that no part of the taxes for school purposes shall be deducted for expenses of collection, except where special taxes are imposed. Such taxes being out of the regular order, it may require special work, for which compensation is provided. The taxes in question are, however, not special in any view that may be taken, and hence it is not necessary to determine

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what, under the several provisions of our statutes, would constitute special taxes.

The judgment is therefore reversed, and the case is remanded to the district court of Cache County, with directions to set aside its conclusions of law and judgment, and to enter conclusions of law and judgment directing the defendant to pay over to the plaintiff, as prayed in its application, the amount there demanded, without interest however. Plaintiff to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

ALLEN v. ALLEN

No. 3052. Decided July 27, 1917. (166 Pac. 1169)

1. **APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.** Findings of fact of the trial court supported by a fair preponderance of the evidence will not be disturbed on appeal. (Page 112.)
2. **FRAUDS, STATUTE OF—PAROL PARTITION OF REALTY.** A parol partition between joint owners of realty, such as partners, when carried out and followed by actual possession in severalty of the several parcels, is valid, and will be enforced notwithstanding the statute of frauds.¹ (Page 113.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Joseph S. Allen against Henry H. Allen.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Nebeker, Thatcher & Bowen for appellant.

M. C. Harris and *A. A. Law* for respondent.

APPELLANT'S POINTS

McMahon v. Thornton, 1 Pac. 724, "one partner cannot sue another for his share while the partnership accounts

¹ *Whittemore v. Cope*, 11 Utah, 354, 40 Pac. 256.

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are unsettled." "One partner cannot rightfully demand a division, partition, or sale of the partnership property or effects until an account has been taken, as between the partners, ascertaining and defining their respective rights."

The interest of a partner is not an interest in a specific article**** his share is not separable, but is dependent on a final adjustment. (*Hutchinson v. Dubois*, 7 N. W. 714.) Partnership lands cannot be distinguished from other assets for purposes of settlement. Partnership settlements cannot be made piecemeal. The court must determine all the equities. (*Godfrey v. White*, 5 N. W. 243.)

"It is the general rule that individual transactions constituting part of a general partnership business cannot, at the will of either be severed from the rest and made the basis of a suit at law or in equity." (*Smith v. Putnam*, 82 N. W., 1077; *McRae v. McKenzie*, 2 Div. & B. eq. (n. c.) 232; *Doll v. Hennessy Merc. Co.*, 81 P. 625; *Burlans v. Jefferson*, 76 Fed. 25.) The plaintiff was here invoking the interposition of a court of equity specifically to enforce an alleged oral contract of partition of partnership realty. Defendant had a right to show anything which would show that it would be inequitable and unjust to him to grant the relief. (*Stubbings v. Durham*, 71 N. E. 586; *Harrison v. Harrison*, 15 S. E. 87.)

GIDEON, J.

In this action plaintiff seeks to compel specific performance of an oral agreement between plaintiff and defendant concerning real property that was partitioned or given to the plaintiff in an oral mutual agreement dissolving a partnership existing between the parties, and asks for a decree quieting title to such lands in the plaintiff and for a judgment of the court decreeing the plaintiff and defendant to be the owners as tenants in common of 160 acres of land described in the complaint.

In substance the complaint alleges that in the year 1906, plaintiff and defendant, as copartners, were the owners of divers tracts of land and of personal property in Utah and in Idaho, among which land was parcel described as a thirteen-

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acre tract and consisting of 13 ²⁰/₁₀₀ acres; that the legal title thereto was, and now is, in the name of the defendant; that in April, 1906, the partnership was dissolved by mutual agreement and all the partnership property, except the 160 acres, which was held under contract for purchase from the state of Utah, was partitioned and divided among the respective partners; that by that partition or agreement of dissolution the thirteen-acre tract was awarded to the plaintiff; and that immediately thereafter the plaintiff went into possession of the same and remained in the undisturbed possession until May, 1912, when the defendant made claim to that property. It is further alleged that in the year 1899 the partnership purchased from the state of Utah, under a ten-year contract, the 160 acres, and that the contract was made in the name of the defendant, and that it was agreed that no partition of that should be made until the title was obtained, and that each party should pay one-half of the annual installments and jointly occupy and use the premises; that plaintiff had performed his part of the agreement and had paid one-half of the annual payments up to and including the eighth payment and had tendered his pro rata share of the annual payment thereafter, but the defendant had refused to accept them. The plaintiff tendered and offered to pay his pro rata share in court for the use of the defendant. It is further alleged that at various times in January, 1910, defendant had promised to make conveyance of the thirteen-acre tract to plaintiff, but had neglected and refused to do so.

The answer, in substance, alleges, that in the year 1898 plaintiff and defendant, and one J. C. Allen, were copartners and owned real and personal property in Utah and in Idaho, including, among others, the said thirteen-acre tract, and in that year, by mutual agreement, the firm's assets were divided and partitioned, and the thirteen-acre tract was awarded to plaintiff; that by the same agreement a twelve-acre tract and a three-acre tract, the record title of which was in the name of Thomas Horne, were awarded to defendant; that immediately after the dissolution of the former partnership the plaintiff and defendant formed a partnership for the purpose of

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farming land owned by each, including the thirteen-acre, the twelve-acre, and the three-acre tracts, and that while that partnership was in existence, in about the year 1899, an oral agreement was made between plaintiff and defendant to exchange the twelve-acre and three-acre tracts for the thirteen-acre tract, or, at plaintiff's option, for fifteen acres out of a larger tract known as the "Brawley field," the legal title to which at that time was in plaintiff, and that in pursuance of that agreement defendant surrendered to plaintiff a deed to the twelve-acre and three-acre tracts, and that it was returned to the original grantor, Thomas Horne, and a new deed executed conveying title to plaintiff, Joseph S. Allen; that at the dissolution of the second partnership the defendant demanded of plaintiff either the said thirteen-acre tract or fifteen acres out of the Brawley field, but that plaintiff refused to convey either. The answer admits that plaintiff has been in the continued possession since 1906 of the said three tracts of land, marked (20), (16), and (7) on the plat inserted herein. Defendant further alleges that it would be inequitable and unjust to require conveyance by him of the thirteen-acre tract, and that to do so would cause him irreparable injury. The defendant further admits the purchase by the parties of the 160 acres from the state of Utah, and that each partner agreed to pay one-half of the purchase price, but alleges an abandonment of the contract of purchase by the plaintiff and the subsequent payment and procurement of patent by himself. The answer further denies the agreement to convey the thirteen-acre tract, and alleges payment of taxes on both the thirteen-acre tract and the 160 acres.

For a counterclaim defendant alleges the existence of the partnership dissolved in 1898 and the partition and award of lands on the termination of that partnership, the formation and dissolution of the second partnership, and agreement for the exchange of lands between himself and plaintiff, his consequent surrender of the deed to the twelve-acre tract, the fact that plaintiff had procured a new deed conveying the title of such tract to himself, the retention by plaintiff of the thirteen-acre tract, and prays that defendant may be

decreed to be the owner of the thirteen-acre tract and of the 160 acres, and for damages for detention by plaintiff of the thirteen-acre tract.

The reply of the plaintiff admits the partnership dissolution of 1898, the formation of a new partnership between plaintiff and defendant and its dissolution in 1906, but puts in issue the award of the twelve-acre and three-acre tracts to defendant in 1898, and denies any agreement to exchange lands with defendant; alleges possession by plaintiff and defendant, as joint owners, of the twelve-acre and three-acre tracts and the Brawley field comprising fifty-nine acres, particularly describing it, during the existence of the partnership between plaintiff and defendant, and further alleges that he is now the owner in fee simple of the Brawley field and entitled to have his title quieted thereto; denies the abandonment or rescission by him of the agreement to purchase the 160 acres, and alleges his willingness to pay his pro rata share of the purchase price thereof.

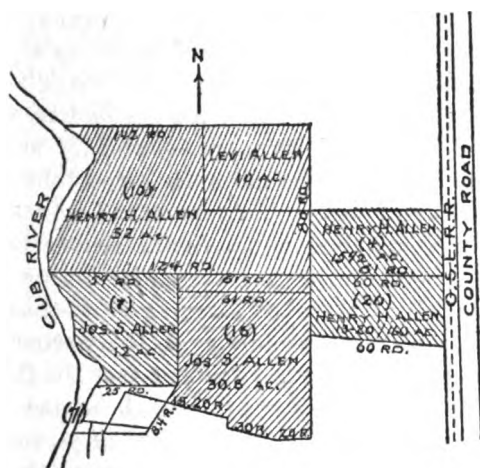
By a supplemental complaint filed just before the trial plaintiff seeks to recover damages for the retention of the 160 acres by defendant from the time of the filing of the complaint to the trial of the action.

A trial was had before the court, and findings of fact, conclusions of law and judgment entered, finding all the issues in favor of plaintiff. From those findings and judgment defendant brings the case to this court on appeal.

Some twenty-nine assignments of error are made attacking the different findings of the court, but in appellant's brief the numerous assignments are argued under two general heads, namely: (1) The findings are against the evidence; and (2) that the conclusions of law and judgment do not follow from and are not supported by the findings.

The following map or plat will aid in understanding this opinion as well as explain the claims of the parties hereto:

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It was agreed by both parties to this action, and also by their brother J. C. Allen in his testimony, that in the partition or dissolution of the copartnership, which consisted of the three brothers, prior to 1898, the thirteen-acre tract of land described in plaintiff's complaint, title to which he asks to have quieted in him, was, by that allotment or partition, awarded to plaintiff; that at the time and up till the trial of this action the record title to that tract stood in the name of the defendant. Respondent's testimony is clear that in that same partition the twelve-acre and three-acre tracts were also awarded and given to him. On that particular point the testimony of appellant and of James C. Allen, one of the original partners, is that at that time the twelve-acre and three-acre tracts were partitioned to appellant, and that the record title at that particular date was in the name of one Thomas Horne. It is admitted that immediately after the dissolution of the partnership, consisting of the three brothers, in 1898, another partnership was formed between the plaintiff and defendant to carry on and continue business of the same nature as the former partnership, and that that partnership continued until about the year 1906, when it was dissolved by mutual consent.

Plaintiff contends, and the court found, that all the real estate which had been partitioned or given to both plaintiff

and defendant in the dissolution of the former partnership became the partnership property and made up a part of the assets of the new partnership. That finding is attacked by appellant, and it is insisted that such a finding is not only not supported by the evidence, but is contrary to the weight of the evidence. If it were necessary to sustain the court's judgment that that finding be supported by the evidence, then the case would, in my judgment, have to be reversed, but in view of the lower court's findings on other issues, and in our view of the matter, that finding becomes immaterial.

At the time of the dissolution of the partnership it is agreed by both plaintiff and defendant that the thirteen-acre tract, marked (20) on the plat, as well as the thirty-acre tract, marked (16) on the plat, and the fifty-two-acre tract, marked (10) on the plat, and the fifteen-acre tract, marked (4) on the plat, were all a part of one inclosure, and had been jointly used and cultivated by the partnership from 1898 up until the date of its dissolution. The plaintiff testified that at the time of the partition and dissolution of the partnership between him and defendant a line was drawn dividing the property, which line was a division line running east and west immediately north of the twelve-acre tract, marked (7) on the plat, the thirty-acre tract, marked (16) on the plat, and the thirteen-acre tract, marked (20) on the plat, and that he gave defendant the right to take either the part of the land lying north or the part of the land lying south of that line and west of the county road. He testified that the defendant first selected the land lying south, which would include the thirteen-acre, the thirty-acre, and the twelve-acre tracts, and that plaintiff immediately took possession of the land lying north of the division line; that within a few days thereafter appellant returned to respondent and stated that he was not satisfied with the division, and thereupon plaintiff gave him the option to exchange, if he so desired, and the exchange was made; and the plaintiff then took possession of the land lying south of the line drawn by plaintiff, and he has continued in possession of the same up until the institution of this action, and that at the same time appel-

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lant took possession of the land lying north of the division line, namely, the fifty-two-acre tract and the fifteen-acre tract, and has continued in possession of those lands ever since.

It is contended by plaintiff, and the court so found, that from the year 1898 to the year 1906, the taxes on all of the land referred to herein, and other land similarly occupied by the partners, were paid from the general or partnership fund, and that the land was cultivated jointly and the harvests sold and the proceeds used by the partnership in carrying on the partnership business; that since 1906 plaintiff has paid all taxes assessed against, and been in the open possession of, the lands partitioned to him, or all of the lands lying south of the division line, and that during all that time defendant had been in possession of the land lying north of the division line, and has paid all taxes assessed against that land; that at no time did appellant make any claim to the thirteen-acre tract, and that the plaintiff had no knowledge or information that the title to that tract was in appellant until about the year 1910 or 1911, at which time he approached the defendant and asked for a conveyance, and his testimony is that the defendant promised to make a conveyance, but failed to do so, and thereafter, in 1912, for the first time, made claim to this land and attempted to eject plaintiff and his workmen therefrom, and that this suit was immediately started thereafter. It is also disclosed that these parties owned other lands located in Cache County, Utah, as well as in the state of Idaho, which they cultivated and farmed during the continuance of the partnership, and that during the continuance of the partnership a sixty-acre tract located in Cache County, the legal title to which was in the name of plaintiff, was sold and the proceeds immediately deposited to the credit of the partnership, and was invested in sheep which belonged to the partnership, and both plaintiff and defendant participated in the profits of the sheep purchased with that money.

The defendant maintains, as alleged in his answer and counterclaim, that under the original partition among the three brothers the twelve-acre and three-acre tracts were given to him, and that thereafter, in about the year 1899, an oral

arrangement was made between the appellant and respondent by which the appellant agreed to give to the respondent the twelve-acre and three-acre tracts in exchange for the thirteen-acre tract, or a fifteen-acre tract belonging to plaintiff located about two miles from this property in what is known as the Brawley farm, and that in consideration of that agreement of exchange a deed, which he held for the twelve-acre and three-acre tracts, and which had not been recorded, and which had been executed by the original owner, one Thomas Horne, was given the plaintiff, and he in turn took the deed back to the original grantor, Thomas Horne, and that deed was destroyed and a new one executed conveying title to the twelve-acre and three-acre tracts to the plaintiff. That agreement was denied by the plaintiff, and the court found that no such agreement was ever made, and that the twelve-acre and three-acre tracts were a part of the original award made to the plaintiff by the partition of the land in 1898. Plaintiff also insists that if any such an agreement as alleged in the counterclaim was entered into, it was within the statute of frauds, and therefore void. As the court found no such an agreement was ever made, the question as to whether it was void under the statute of frauds becomes immaterial.

There is a sharp conflict between the testimony of the plaintiff and the defendant, and there is testimony from other witnesses which corroborates both the testimony of the plaintiff and defendant, but from an examination of the entire record it satisfactorily appears that the findings of the court are supported by a fair preponderance of the evidence, and, under the oft-repeated and recognized rule of this court, should not be disturbed.

Appellant contends that, even though the findings are supported by the testimony, the conclusions of law of the court are contrary to the findings as made. He insists that if it appears in this case that the property here in question is partnership property, an action affecting only a part of that property cannot be maintained, and that the plaintiff's remedy would be to ask for an accounting and the closing up of the entire partnership affairs before any relief can be

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granted to him. The appellant has tendered no such issue in his answer, and the findings of the court are against his contention. It is true that there was some testimony that there was other real property which was used by the partnership located in the state of Idaho which had not yet been divided, but it also appears from that same testimony that the title to the different pieces of land located in Idaho remained in the same name or individual to whom the land was partitioned in the original dissolution in 1898, and, as indicated elsewhere in this opinion, we do not think that the testimony supports the finding that the real property of plaintiff and defendant ever became part of the assets of the later partnership. Moreover, there is no issue made by the pleadings with reference to an unsettled partnership account. On the contrary, the defendant in his answer makes claim to the thirteen-acre tract, being the land in question so far as the plaintiff's complaint is concerned, and undertakes to claim title to that by contract made between him and plaintiff.

Whether the court is supported in its findings that the lands of plaintiff and defendant became part of the assets of the partnership formed in 1898 is immaterial in our view of the matter, as the court also made findings that under the dissolution or partition of 1898 all of the tracts of 2 land now claimed by plaintiff were awarded and apportioned to him. Under the holding of this court in *Whittemore v. Cope*, 11 Utah, 354, 40 Pac. 256, a parol partition between joint owners of real property, when carried out and followed by actual possession in severalty of the several parcels, is valid and will be enforced, notwithstanding the statute of frauds.

The finding of the court concerning the 160 acres purchased from the state of Utah is not only supported by the evidence, but that finding would seem to be the only conclusion that could have been arrived at from a consideration of the testimony offered relating to that particular phase of the case.

The respondent has filed cross-assignments of error and complains that the court erred in retaxing costs on defendant's motion, and of the failure of the court to allow the plaintiff damages for the use of the 160-acre tract from the year 1909,

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when it was claimed that the appellant took exclusive possession of the property and refused to allow respondent to keep stock thereon. From an examination of the record we are not disposed to disturb the rulings of the court on the questions there involved.

We are satisfied that the findings of the lower court are supported by the evidence, and that the findings support the conclusions and judgment. It therefore follows that the judgment should be affirmed. Such is the order. Respondent to recover costs.

FRICK, C. J., and McCARTY, CORFMAN, and THURMAN, JJ., concur.

RIO GRANDE LUMBER CO. v. DARKE et al.

No. 3051. Decided July 28, 1917. (167 Pac. 241.)

1. CONSTITUTIONAL LAW—VALIDITY OF STATUTES. The court will not declare a statute unconstitutional and void because of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless such injustice is prohibited or the rights are guaranteed by the Constitution. (Page 119.)
2. CONSTITUTIONAL LAW—JUDICIAL FUNCTIONS—POLICY OF EXPEDIENCY OF STATUTE. In construing a statute when its validity is attacked on constitutional grounds, the courts will not consider questions of policy or expediency. (Page 119.)
3. CONSTITUTIONAL LAW—LEGISLATIVE POWERS. Except where the Constitution has imposed limits upon the legislative power, it is absolute, whether it operates according to natural justice or not. (Page 119.)
4. CONSTITUTIONAL LAW—PRESUMPTIONS IN FAVOR OF CONSTITUTIONALITY. All reasonable doubts as to the constitutionality of a statute must be resolved in its favor.¹ (Page 119.)
5. CONSTITUTIONAL LAW—MECHANICS' LIENS 313—DUE PROCESS OF LAW—CONTRACTORS' BONDS. Laws 1915, c. 91, requiring the owner of land desiring to make a contract for construction of a building for a price exceeding \$500 to obtain a bond payable to the owner in a sum equal to the contract price conditioned for faithful performance

¹ *State ex rel. Breeden v. Lewis*, 26 Utah, 120, 72 Pac. 388; *Young v. Salt Lake City*, 24 Utah, 321, 67 Pac. 1066; *State ex rel. U. of U. v. Candland*, 36 Utah, 406, 104 Pac. 285, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834.

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of the contract, and payment of accounts for labor and material, is not unconstitutional as depriving the landowner of due process of law. (Page 122.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Rio Grande Lumber Company against E. W. Darke and others.

Judgment for plaintiff. Defendants appeal.

AFFIRMED.

Richards, Hart & VanDam for appellant.

James Ingebretsen for respondent.

THURMAN, J.

Appellants, by this appeal, challenge the constitutionality of an act of the Legislature "relating to the performance of building contracts." Chapter 91, Sess. Laws 1915. For the reason that the constitutionality of the act is brought in question the case assumes an importance it otherwise would not attain. The act, in substance, provides that any person making a contract for the construction of a building or structure on his land, for a price exceeding \$500, shall obtain from the contractor a good and sufficient bond with sureties payable to the owner for the benefit of himself and any parties interested, in a sum equal to the contract price conditioned for the faithful performance of the contract and the payment of accounts for labor and material used in the structure. The statute further provides that any person furnishing labor or material has a direct right of action against the sureties for the amount due, and further provides that a failure on the part of the owner to procure said bond renders him liable for the payment of said obligations. Other provisions of the statute are not material to this opinion.

The complaint of the plaintiff, which is brought under the provisions of the act, in substance, states: That plaintiff is a corporation; that defendant E. W. Darke is and was a gen-

eral contractor in Salt Lake City; that on the 31st day of October, 1915, defendant Webb and wife entered into a contract with Darke by which Darke was to construct a building for them on their land situated in Salt Lake City for a sum not exceeding \$500; that Webb and wife did not obtain from Darke a bond for the benefit of the owners, Webb and wife, and of other parties interested in any manner, or at all; that defendant Darke was insolvent, and depended for necessary labor and materials upon such credit as he might obtain from laborers and materialmen upon their reliance of right to a mechanic's lien and a bond conditioned for the payment of their accounts; that defendants Webb and wife made no inquiries concerning the solvency and responsibility of Darke, and each of them knew of his insolvency and irresponsibility; that plaintiff extended credit to defendant Darke and delivered materials to him, believing that Webb and wife had either procured a bond, as provided in the act, or that they would themselves be responsible for the value of materials furnished by plaintiff; that the contract price for constructing said building, stipulated for between the defendants, if devoted entirely to the payment of labor and materials, would have paid said accounts in full; that said building could have been erected for the price stipulated, leaving a profit to the contractor; that Webb and wife, during the progress of the work, paid Darke a sum in excess of the amount due plaintiff, but took no precautions to have Darke pay any part of plaintiff's account, and Darke appropriated all of it to his own use; that thereafter Darke defaulted in the performance of his contract, leaving the building unfinished, and Webb and wife were compelled to complete it; that by reason of Webb and wife failing to procure a bond from Darke, as provided by the statute, they were unable to compel Darke, or his sureties, to complete the contract; that by reason of the foregoing conditions plaintiff has no means of collecting its accounts, except from the defendants Webb and wife. Then follows a statement of materials furnished, with the price thereof and credits allowed, leaving a balance due plaintiff of \$479.45, for which plaintiff prays judgment, with interest and costs. To this

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complaint defendants Webb and wife filed and served a general demurrer, which was overruled by the court, and, upon their refusal to further plead, judgment was entered against all of the defendants.

Defendants Webb and wife appeal to this court and assign as error the overruling of the demurrer and the entry of judgment thereon. The point of appellant's demurrer, as appears from their brief, is that the legislative act in question is in contravention of article 1, section 7, of the state Constitution, which reads as follows:

"No person shall be deprived of life, liberty or property, without due process of law."

It is likewise urged that the statute conflicts with the Fourteenth Amendment to the Constitution of the United States, which provides *inter alia*:

"Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellants characterize the act of the Legislature as vicious, and charge that it deprives the owner of his property by interfering with its use, and that it is an unnecessary and unreasonable restriction on the power to contract. To challenge the constitutionality of a solemn and deliberate act of legislation by the lawmaking power of a sovereign state always presents a serious question, however trifling or insignificant may be the amount involved in the particular case. The citizens of a free government are justly jealous of their constitutional rights and privileges, and this should be attributed to them as a virtue rather than a fault. It keeps them on the alert and inspires them with courage and determination in their efforts to resist the aggressions of arbitrary power. It is just as obligatory upon the citizen to resist encroachments upon his rights and liberties guaranteed by the Constitution as it is for him to uphold and maintain its integrity. It is therefore to be expected that whenever one of the co-ordinate departments of the government impinges upon the prerogatives of another, or transcends the limits of its constitutional authority, the citizen who is immediately and directly affected will resist

the encroachment and challenge the authority of the department thus transcending its power. Not only will he do so when the department actually transcends its power, but oftentimes, as the annals of jurisprudence show, he does so before it has reached that point, if it approaches near the border line. No fault can be found with this prudent watchfulness on the part of the citizen; indeed, it oftentimes happens that every other citizen of the commonwealth becomes deeply indebted to him whose watchfulness and courage prompt him to contest the authority for the exercise of the disputed power. When such questions arise in judicial proceedings it is the duty of the court to deal with them in the light of those fundamental rules of construction which are recognized and established, and which are themselves as rigid and binding as the constitutional provision it is called upon to determine. 'As stated by one of the most eminent exponents of constitutional law:

"It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it." Cooley's Constitutional Limitations (6th Ed.) 192.

Continuing the subject on the next page, the same author says:

"The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation. It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold."

These considerations, as before stated, have led to the establishment of certain positive and fixed rules of construction by which the courts are bound in determining whether or not a particular statute is unconstitutional.

One of the fundamental rules to be applied in determining a question of this kind is that a court will not declare a statute

unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, 1 unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution. Same author, p. 197. See, also, R. C. L. vol. 6, pp. 104-106, inclusive.

Furthermore, it is a fundamental rule in construing a statute when its validity is challenged on constitutional grounds that the courts will not consider mere questions of policy or expediency. These are matters of legislation, and belong to the legislative department of the government. 2 R. C. L. pp. 104-111, inclusive; Cooley's Constitutional Limitations, pp. 200-203, inclusive. For the judiciary to dictate in matters of policy and expediency and seek to nullify acts of the lawmaking body, because it conceives that such acts are impolitic or unnecessary, would be just as flagrant a violation of the Constitution as would be an act of the Legislature which would deprive a person of life, liberty, or property without due process of law.

Another rule of construction in cases of this kind must not be overlooked, and that is that except where the Constitution, either federal or state, has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, 3 in any particular case. Courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within judicial cognizance.

These considerations finally lead up to another rule of construction where the constitutional validity of a statute is involved which is equally binding upon the courts with the other rules we have mentioned, and that is, that after fully and fairly considering the powers of the legislative 4 body and the limitations of its power under the Constitution, if there is a reasonable doubt in the mind of the court, that doubt must be cast in favor of the validity of the act. Cooley's Constitutional Limitations, pp. 216, 217. Mr. Jus-

tice Washington, of the Supreme Court of the United States, upon this point, uses the following language:

“But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt. That has always been the language of this court when that subject has called for its decision.”

This exposition of the rule was made in one of the most important cases that has arisen under the federal Constitution. *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; R. C. L. 97-104, inclusive. See, also, *State ex rel. Breeden v. Lewis*, 26 Utah, 120, 72 Pac. 388; *Young v. Salt Lake City*, 24 Utah, 321, 67 Pac. 1066; *State ex rel. U. of U. v. Candland*, 36 Utah, 406, 104 Pac. 285, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834. Any other rule than this would be inconsistent and untenable from every point of view, and would be a reflection upon the wisdom and motives, and an interference with the prerogatives, of an independent co-ordinate department. These rules are fundamental and elementary. It is perhaps unnecessary to cite authority in their support.

Appellants, in their contention against the validity of the statute in question, rely for authority upon decisions of the California Supreme Court construing statutes passed by the Legislature of that state. Appellants have quoted in their brief the statute which was declared unconstitutional, for the purpose, we assume, of showing the similarity to the Utah statute now under review and to give force and effect to the decisions upon which they rely. For a clearer understanding of this opinion, and in fairness to appellants, who rely implicitly on the decisions of the courts of that state construing the California statute, we here briefly state its substance. It provides that every building contract when filed shall be accompanied by a good and sufficient bond for the security of all persons who perform labor or furnish materials to the contractor. Any of such persons have a right of action on the bond. Any failure to furnish such bond renders both the

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owner and contractor liable. Immaterial provisions are omitted.

The leading case cited by appellants is *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815. The action was by the assignee of certain persons, who had performed labor and furnished materials, against the defendant, owner of the property, for failure to cause a bond to be filed in accordance with the statute. A bond was filed, but was defective in form and treated as no bond at all, so that the form of action and the grounds alleged are sufficiently analogous to the case at bar to make it a case in point as far as the nature of the action is concerned. In reviewing the statute and criticizing it, at page 375 of 133 Cal., at page 971 of 65 Pac., 60 L. R. A. 815, the court, by Mr. Justice Temple, said:

"The statute does not say who shall cause this bond to be executed, nor to whom it shall, in form, be made payable. It does not undertake that the contractor shall faithfully perform his contract. In short, there is in it nothing which can be of advantage to the owner in any possible event."

By an examination of the entire opinion it will be seen that the points made in the above quotation constitute the principal objections upon which the statute was declared to be unconstitutional. We think we are not unfair at this point if we remark that no portion of the above criticism can be justly applied to the Utah statute in even the slightest particular, for, in the particulars mentioned, the Utah statute is unlike the California statute in every respect. The Utah statute does say who shall cause the bond to be executed, namely, the owner of the land shall procure it from the contractor; it does say to whom it shall be made payable, namely, the owner of the land, for the benefit of the owner or any party interested; it does provide that the bond shall be conditioned for the faithful performance of the contract and for the payment of the accounts contracted for material furnished and labor performed; and, finally, it does provide for something which can be of advantage to the owner. If the owners, appellants in this case, had procured a bond from the contractor Darke, payable to the appellants for their benefit and the benefit of others that might be interested, as required by the statute, the

appellants would have been fully protected against the defaulting contractor, and everybody concerned would have likewise been protected. So that, so much of the criticism of the California court as we have quoted above—and we have quoted its strongest objections—is without application so far as the Utah statute and the case at bar are concerned. If the learned justice who wrote the opinion from which we have quoted had been criticising the Utah statute instead of the statute of his own state, his criticism would, of necessity, if made at all, have been entirely different because of the striking dissimilarity of the statutes in nearly every essential particular. His criticism of that statute may have been entirely just and proper, and the statute may have been invalid and obnoxious to the objections pointed out, but it does not follow that another statute not containing these objectionable features might not be unassailable from a constitutional point of view.

The aim and purpose of our mechanic's lien law manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement. The result has been that the owner of the premises, at whose in- 5 stance and for whose benefit the improvement is made, has been the one most likely to suffer loss. He pays at his peril the original contractor, who generally needs it and demands it as the work progresses. If he does not reserve enough of the fund in his own hands to pay for the labor of subcontractors and employees, and the price of materials, he incurs the risk of having to pay over again for at least a part of these items. The original contractor, as in this case, often defaults, with his compensation overdrawn and with subcontractors, employees, and materialmen unpaid. The owner of the premises suffers in consequence because his property is pledged for the payment of these obligations. This case is only one of many. In view of these facts and conditions, more or less prevalent, owing to the vast amount of building and improvement of various kinds going on in the communities of the state, is it manifestly unreasonable, harsh, or oppressive, or in contravention of any provision of the Constitution, for the

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Legislature to require by law, as it has done in this case, that every person who contemplates the erection of a building or structure, such as are mentioned in the statute, shall exact of his contractor, the person to whom he lets the work, a good and sufficient bond for the performance of his contract, the payment of laborers and materialmen, and, upon his failure to procure such bond, that he himself shall pay the unpaid bills and accounts? Can it be said that this is even an unreasonable regulation, much less a violation of the Constitution? The purpose and object is for the protection of all parties concerned, except the original contractor, who, as experience has demonstrated, has less need of protection than any one else concerned in the business. It has not been made to appear to our satisfaction that the statute, requiring a bond in case of this kind, deprives any one of "his property without due process of law by interfering with its use," or that it is an "unnecessary or unreasonable restriction on the power to contract." Besides, as we have shown, the fact that legislation may be unnecessary, unreasonable, or even harsh will not justify this court in declaring it unconstitutional unless the provision violated is clearly pointed out. It certainly does not deprive the owner of the premises of his property, but is rather for his protection, as we believe we have shown.

The decision of the California court, above referred to, was approved by later decisions. *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150; *Montague v. Furness*, 145 Cal. 205, 78 Pac. 640. All of these cases are cited in appellants' brief and relied on in support of their contention. We do not deem it necessary to review them at length, in view of our expressed opinion concerning the leading case and the striking dissimilarity between the statutes of the two states.

But whatever may be the just and proper view to take of the California statute above referred to and the line of decisions holding it to be unconstitutional, a more recent decision by the Supreme Court of that state construing a later statute, and holding it to be constitutional, is somewhat illuminating upon the question presented before the court. As sug-

gested by respondent in its brief, our statute evidently was not modeled after either the old or the new statute of California, but in its essential features corresponds with the later statute. That statute prescribes who shall furnish the bond, and makes it payable to the owner as well as to the laborers and material-men. It is conditioned for the faithful performance of the contract as well as the payment of accounts for labor and material. It limits the bond to the contract price, and for the payment only of labor and materials used in the building or structure. If the owner neglects or fails to obtain the bond from the contractor, he becomes directly liable to those who perform the work and furnish the materials. In all these respects the statute, as far as the bond feature is concerned, is substantially the same as ours. The California court has construed this statute after a vigorous contest challenging its constitutionality, and held it to be constitutional. *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15. The act was incorporated into the mechanic's lien law of the state and made part of it. Some special virtue is claimed for it by appellants on that account, but we are constrained to agree with respondent that this contention is without merit. If the principle of exacting a bond in such cases is wrong and in violation of the Constitution, it could not be purged of its illegality by incorporating it into another law and making it a part thereof. The fact that the Constitution of California makes express provisions for a mechanic's lien law does not alter the case. The Utah mechanic's lien law is not made in pursuance of any express requirement of the Constitution; but the law may, nevertheless, be constitutional because the Constitution does not prohibit it. The statute of Utah now under review is auxiliary to our mechanic's lien law, and just as much in aid of it as if it had been made a part of it and incorporated in the same chapter.

The *Roystone Case*, *supra*, is one in which suit was brought for foreclosure of mechanic's liens, and the owner of the premises and the surety on the contractor's bond were made defendants. Judgment was found against defendants, but the surety only appealed. The surety urged the objection that the

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statute was unconstitutional, relying upon decisions in the Gibbs and other cases heretofore referred to. Substantially the same objections were made by appellants as were made in the Gibbs and subsequent cases. After stating some fundamental differences and objectionable provisions that had existed in previous statutes, at page 540 of 171 Cal., at page 21 of 154 Pac., the court, speaking of the later statute, says:

“The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden. It is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power.”

The court then cites the cases under the old law holding it to be unconstitutional, and proceeds to a more detailed statement of the provisions of the old law and the facts involved in the Gibbs case in which the unconstitutionality of the statute was determined, after which, on the same page, the court says:

“The facts involved in the case have no necessary bearing upon the question whether or not the Legislature could, in any case, require the contractor to file a bond for the benefit of persons having claims against him regarding the same before entering upon the work.”

Again, at page 542 of 171 Cal., at page 22 of 154 Pac., the court says:

“We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of his contractor while, at the same time, lien claimants are afforded a security for the payment of their claims. We therefore hold that the foregoing decisions are not applicable, and that the provision for requiring this bond is not unconstitutional or invalid.”

The court, in other portions of its opinion, undertakes to distinguish the Gibbs Case from the case then under review, and unfortunately, in our judgment, assigns confusing reasons for an otherwise good opinion. It could, with perfect

consistency, have stated that the Legislature in the new law had cured the defects in the old law specifically pointed out in the Gibbs and subsequent cases, thus meeting every objection made as to the constitutionality of the act. Had it done so it would have avoided attempted explanations and distinctions having more the characteristics of an apology than of a plain, courageous statement of the obvious reasons for its opinion. The old statute of California, by implication at least, required the owner to furnish a bond to secure the payment of obligations he did not contract, and that to strangers with whom he had no contractual relations whatever. Such an act would seem to be obnoxious to the constitutional inhibition relied on. For that reason we are not disposed, as before stated, to find fault with the decision in the Gibbs Case, nor with the decisions in the other cases holding the same view. But the new statute of California, under which the Roystone Case was tried, and the Utah statute under review, obviating the objections to the old statute, simply require the owner who contemplates erecting a building or structure to require his contractor to furnish a bond to secure the contractor's debts and obligations incurred in respect to the building or other structure. If the owner neglects to take this precaution for his own safety he becomes liable for the price of the labor and materials entering into the erection of the structure, even though the amount may exceed his original contract. Hence the old statute was declared unconstitutional while the constitutionality of the new statute by the same court was upheld. The Roystone Case, although cited and distinguished by appellants, in our judgment, strongly supports the validity of the statute which is the subject of this appeal.

The mechanic's lien laws as found in most of the states are referred to by respondent by way of analogy, inasmuch as the claims of laborers and materialmen for labor and materials used in the building or improvement are, by the law, without the owner's consent, made liens upon the property improved. It is claimed that these laws are generally held to be not obnoxious to the constitutional inhibition relied on in the case at bar, and that if such laws are not obnoxious to such

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constitutional inhibition there is no logical reason for holding a bond requirement unconstitutional. Without passing upon the question whether or not the ordinary mechanic's lien laws are constitutional, as that identical question is not involved, we are nevertheless forced to admit that there appears to be a strong analogy in essential particulars. The mechanic's lien laws providing for liens upon the property improved without the owner's consent, even beyond the contract price, where the owner fails to hold the fund for the payment of labor and materials, have generally, though not always, been upheld as constitutional, principally upon two grounds: (1) That the labor and materials used in the building are a direct benefit to the owner for which the property improved should be liable; (2) that he is presumed to contract with full knowledge of the law, and he has the power to protect himself against loss by safeguarding the fund necessary to pay for labor and materials. These are generally the answers made to every attack made upon the constitutionality of these laws. We are unable to see why the same answer, in principle at least, may not be made where the validity of a statute requiring a bond is brought in question. The bond, as in this case is conditioned for the faithful performance of the contract and securing the payment of laborers and materialmen. If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands. Under the mechanic's lien law, if he fails to hold the fund for the payment of laborers and materialmen, the same misfortune may occur. To use the epigrammatic expression of respondent's brief:

"Under the bond statute he must take care to exact the bond, and under the lien statute he must take care to hold the fund."

We are unable to find any reason for declaring the statute in question unconstitutional. Certainly, to say the least, reasonable doubts as to its unconstitutionality, after thoroughly considering the question, are such as to render it the impera-

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tive duty of the court to declare the statute valid as against the objections made. It is ordered by the court that the judgment be affirmed. Respondent to recover costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

SHIELDS v. SILVER KING COALITION MINES CO.

No. 2954. Decided August 1, 1917. (166 Pac. 988.)

MASTER AND SERVANT—"FELLOW SERVANT." Two miners working on different levels in a mine are not working at the same place, and are not "fellow servants" within Comp. Laws 1907, section 1343, providing that all persons who are engaged in the service of the same employer and working together at the same time and place, etc., are fellow servants.¹

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by George C. Shields against the Silver King Coalition Mines Company, a corporation.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Dickson, Ellis, Ellis & Schulder for appellant.

Evans, Evans & Folland for respondent.

FRICK, C. J.

The plaintiff, as an employee, recovered judgment against the defendant, a mining corporation, for damages for personal injuries. The defendant appeals from the judgment.

Counsel for defendant, in their brief, state the question presented for review in the following words:

¹ *Dryburg v. Mining & Milling Co.*, 18 Utah, 410, 55 Pac. 367; *Neesley v. Southern Pac. Co.*, 35 Utah, 259, 99 Pac. 1067; *Meyers v. Railroad*, 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1229; *Shepherd v. Railroad*, 41 Utah, 469, 126 Pac. 692; *Vota v. Copper Co.*, 42 Utah, 129, 129 Pac. 349.

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"The sole question here presented for review * * * is: Were the plaintiff and his coemployee Neil fellow servants within our statute?"

The statute referred to (Comp. Laws 1907, section 1343) reads:

"All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

Briefly stated, the facts upon which counsel's statement is based are as follows: On the day of the accident, and for some time prior thereto, the plaintiff was employed in the defendant's metal mine in Summit County, Utah. The point in the mine where the accident occurred is known as the Creole or 1,000-foot level. From that level an incline at an angle of from thirty-five to forty degrees extends upwards to what is known as the 900-foot level. The length of the incline, that is, the distance between what is called the Creole level and the 900-foot level, is variously stated in the evidence. The plaintiff estimated the distance at about 120 feet, while a witness for the defendant gave the distance by actual measurement as eighty feet. The plaintiff was engaged at the foot of the incline, where what is called a "turntable" is located. The turntable was an ordinary turntable used in mines to direct mine cars, loaded and unloaded, onto different tracks leading into the different drifts in the mine. There was a track on the incline in question which was used to take mine cars loaded with ore from the 1,000-foot or Creole level where the plaintiff was working to the 900-foot level where one Neil, plaintiff's coemployee, was working. On the 900-foot level

there was a level space running back about twenty feet from the edge of the incline. At the rear of that space there was located what is called a donkey engine, which was operated by Neil and was used to pull loaded mine cars up from the 1,000-foot level to the 900-foot level to the point where Neil was working, and to lower empty cars down from the 900-foot level to the 1,000-foot level.

It was plaintiff's duty to receive cars loaded with ore from different parts of the mine at the foot of the incline and, by means of the turntable, to direct them on to the track leading up the incline and to attach the cable to the cars by means of which they were pulled up the incline. Neil was standing at the head of the incline, and operated the donkey engine by means of which the cars were pulled up the incline, and he received the cars at the top of the incline and directed them into the proper drifts. It was also Neil's duty to attach the empty cars to the cable, and by means of the engine and cable to lower them down to the 1,000-foot level where plaintiff was working. When the plaintiff had attached a loaded car to the cable he would signal Neil to pull it up as aforesaid, which was done. Neil, upon the other hand, would attach the empty cars to the cable and lower them down to plaintiff by means of the engine and cable. The empty cars, when placed on the track on the incline, would run down by their own weight, and all Neil would have to do was to regulate their speed, and would stop them by using the brake connected with the donkey engine. For the purpose of fixing the precise point where Neil should stop the empty cars he had made a mark on the cable, and had also wound a rag around it. When, in lowering cars, that point on the cable was reached, Neil would set the brake, and the empty cars would usually stop just before they reached the turntable which was controlled by the plaintiff. Neil, in lowering the empty cars, did not signal plaintiff, but would let them down at any time when necessary, or when it suited his convenience. It seems that both plaintiff and Neil were kept reasonably busy in handling the cars and in operating the donkey engine as before stated. At the time of the accident Neil let down an empty car, but failed to watch the

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cable in order to stop the car when the mark on the cable or rag wound around it was reached, and permitted the car to go beyond the usual point, and the car struck the plaintiff, who was engaged in moving another car onto the turntable, and he was forced between the car coming down the incline and another car, and thus received the injuries complained of. While plaintiff could not see Neil at work, Neil, if he came to the brink or edge of the incline, could look down and see plaintiff. The plaintiff and Neil worked on the same shifts, went to and came from work at the same time, and received the same wage. The evidence is also without dispute that unless it can be said that the plaintiff and Neil were not "working together at the same time and place," or were not engaged "in the same grade of service," within the meaning of the statute, then we must find that they were fellow servants, since every other element which would exclude them from being so is met by the evidence.

Assuming, without deciding, that under the evidence the plaintiff and Neil were engaged in the same grade of service, the only question remaining is, Did they work together at the same time and place within the meaning of the statute? No doubt they worked at the same time, but can it also be said that they worked "together at the same place"? Counsel for appellant vigorously contend that, within the meaning of the statute, they worked together at the same time and place, while counsel for respondent as vigorously insist that they did not. The question, when are two employees of the same master fellow servants, has, in various ways and at different times, been before this court. Some of the principal cases where the rule has been stated are the following: *Dryburg v. Mining & Milling Co.*, 18 Utah, 410, 55 Pac. 367; *Neesley v. Southern Pac. Co.*, 35 Utah, 259, 99 Pac. 1067; *Meyers v. Railroad*, 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1229; *Shepherd v. Railroad*, 41 Utah, 469, 126 Pac. 692; *Vota v. Copper Co.*, 42 Utah, 129, 129 Pac. 349. While, perhaps, it is true that the only case in which the precise question in this case was considered is the *Dryburg Case*, and that in that case the majority of the court did not agree in what is there said, yet the principle

involved in this case has been considered in several of the cases cited, and the question of when are two employees working together at the same place, is discussed in those cases. Even though I had the disposition to do so, I cannot add much, if anything, to what is said upon the question in those cases. If, therefore, the Dryburg Case be excluded from consideration, yet, in my judgment, no one can read the decisions in the other cases cited without arriving at the conclusion that if the precise question now before us had been presented for decision in any one of those cases, it would have been held that the plaintiff and Neil did not work at the same place within the meaning of our statute, and hence were not fellow servants. Nor can we now see any escape from such a conclusion. Where, as here, two servants work on different levels in a mine, although they work "to a common purpose," as it is expressed in the statute, yet they do not necessarily work "together at the same time and place." If it were held that two employees who are working on different levels in a mine are, nevertheless, working at the same place, then may it also be held that one who is working on the first level is working at the same place with one who is working on the fourth, seventh, ninth, or any other level so long as what they do is in furtherance of a common purpose. If plaintiff and Neil were working at the same place within the meaning of the statute, then it is not easy to separate workmen so that they do not work at the same place in a mine in case they are only separated as in the case at bar. The statute must be considered and construed in the light of what the law was upon the subject when it was adopted, and when considered in that light, the words used must be given their usual and ordinary meaning. While it is not necessary that two workmen must work side by side, or come into continuous physical contact, or touch with each other in order to be working at the same place within the meaning of the statute, yet it would be straining the words of the statute beyond their ordinary meaning if it were held that two miners who are working on different levels in a mine are, nevertheless, working at the same place within the purview of the statute. We are all of one mind that, under the undisputed facts in this

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case, the plaintiff and Neil were not working together at the same place in defendant's mine, and hence the district court properly held that they were not fellow servants.

In view of the foregoing it is not necessary to pass upon the further question of whether they were engaged in the same grade of service, and hence we express no opinion upon that subject.

The judgment is affirmed, with costs to respondent.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

BURTON v. MATTSON et ux.

No. 3059. Decided August 1, 1917. (166 Pac. 979.)

1. **LIBEL AND SLANDER—PLEADING.** In an action for libel committed by writing plaintiff's wife by implication that he had illicit relations with another woman, where the letter complained of as being defamatory expressly referred to and named plaintiff, it was not necessary that the amended complaint allege that the words were written of and concerning plaintiff; such an allegation would have been mere surplusage. (Page 137.)
2. **LIBEL AND SLANDER—CONDITIONAL PRIVILEGE—STATUTE.** Under Comp. Laws 1907, section 4204, providing that a communication made to a person who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent is not presumed to be malicious, and is privileged, where defendants, husband and wife, unrelated to plaintiff, wrote to plaintiff's wife in such terms as to imply that he had illicit relations with another woman, the communications were not conditionally privileged, having been made merely on the assumption that plaintiff's wife would regard the act as friendly. (Page 137.)
3. **LIBEL AND SLANDER—PLEADING MALICE.** The complaint, in an action for libel, alleging that the matters contained in the alleged libelous letters were false and libelous, sufficiently alleged that the communications were made with malice. (Page 138.)
4. **LIBEL AND SLANDER—PLEADING—COMPLAINT—STATUTE.** Under Comp. Laws 1907, section 2994, providing that in an action for libel it is not necessary to state in the complaint any extrinsic facts to show the application to plaintiff of the defamatory matter, in an action for libel by writing plaintiff's wife letters implying that plaintiff sustained illicit relations with another woman, where the face of the complaint showed that the publication was concerning

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plaintiff, that it was falsely made with the intent to effect an estrangement between him and his wife, etc., the complaint was not insufficient as containing no inducement, colloquium, or proper innuendoes.¹ (Page 138.)

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action by J. W. Burton against Peter A. Mattson and Mrs. Mabel Mattson, his wife.

From an order dismissing the action on the demurrer to the amended complaint, plaintiff appeals.

REVERSED and REMANDED, with directions.

Hancock & Barnes for appellant.

George Halverson for respondent.

CORFMAN, J.

This appeal involves the sufficiency of plaintiff's amended complaint in an action brought in the district court of Weber county to recover damages by reason of the publication of certain letters of the defendants concerning the plaintiff. Defendants demurred generally to the amended complaint. The demurrer was sustained, with leave given to amend. Plaintiff elected to stand on his amended complaint without further amendment, whereupon the court made its order dismissing the action. Plaintiff appeals.

The amended complaint is as follows:

"That the plaintiff is now and at all times mentioned herein was a farmer and sheep raiser engaged in such business in Davis, Weber, Box Elder, and Cache Counties, state of Utah.

"That on or about the 1st day of April, 1914, the defendants wrote the following letters and mailed them to Mrs. J. W. Burton, Kaysville, Weber County, Utah, and said letters were received by the said Mrs. J. W. Burton, wife of the plaintiff, on or about the 2d day of April, 1914:

¹ *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611.

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“ ‘Ogden, Utah, April 1, 1914.

“ ‘Mrs. J. W. Burton, Dear Madam: Has Mr. Burton not been out of town for the past six months from Wed. to Fridays and has not he told you he was out with his sheep. You may know all about the sheep he is with but if you don't I will tell you that this sheep's name is Mrs. Agnes Grim, known in Ogden as Mrs. John Woods. Three weeks ago tomorrow he went to Brigham City to move this lady, was he away from home at this time? If you stop to think you may know for yourself what I have said is so. I will not give you my name and address today, but one week from today I will write you again and tell you who I am and where I live. Your friend.’

“ ‘Ogden, Utah, April 6, 1914.

“ ‘Mrs. J. W. Burton: I wrote to you some time ago about Mr. Burton's conduct. Now I write this time to tell you who I am. I live at 613 28th street. I am Mrs. P. A. Mattson, Mr. A. E. Williams' daughter of Kaysville. Now Mrs. Burton being a neighbor of Mrs. Woods, also knowing who you were I thought maybe you would like to know about this. I would thank any one who would tell me of such things and consider them my friends. If you should care to hear from me again you would write me at this address.

“ ‘Mrs. P. A. Mattson,

“ ‘613 28th Street, Ogden, Utah.’

“That the matters contained in the foregoing letters were false and libelous, and were intended by the defendants to effect an estrangement between this plaintiff and Mrs. J. W. Burton, the wife of this plaintiff.

“That the above letters were written by the defendant, Mrs. Peter Mattson, at the instance and by and with the co-operation of the defendant Peter Mattson, and the same were received and read by the wife of this plaintiff at Kaysville, Utah, on or about the 7th day of April, 1914; that this plaintiff did not know who were the writers and instigators of said letters until on or about the 15th day of October, 1914.

“That prior to the dates of said letters and the receipt thereof by the wife of this plaintiff, plaintiff and his said wife were living happily together at Kaysville, Utah, and by reason

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of the false and libelous statements contained in said letters an estrangement was created between this plaintiff and his wife, and the said Mrs. J. W. Burton did thereafter institute divorce proceedings against this plaintiff, plaintiff's family was disrupted, his home was disorganized, and he was put to great expense, to wit, the sum of \$2,000 in litigation, resulting directly from said false and libelous letters.

"That the defendants intended by said letters that Mrs. J. W. Burton should thereby be given to understand that this plaintiff was an immoral man and was living in illicit relations with the said Mrs. Agnes Grim referred to in said letters, and the said Mrs. J. W. Burton did, according to the best knowledge, information, and belief of this plaintiff so receive and accept the intendment of said letters.

"That on the 26th day of February, 1915, an action was commenced in the above-entitled court by the plaintiff herein against the defendants on the identical cause of action herein stated, and that said action failed otherwise than on its merits.

"That by reason of said libelous letters so published by the defendants, this plaintiff has been injured in his business relations with various parties in the counties above referred to, his character and reputation have been befouled, and his home been broken up, all to his great damage in the sum of \$10,000, no part of which has been paid.

"Wherefore plaintiff prays for judgment against the defendants in the sum of \$10,000 and for all costs."

It is contended by defendants that the complaint is insufficient in several particulars: (1) That there is no allegation that the alleged libelous and defamatory matter complained of was written of and concerning the plaintiff; (2) the communication complained of is conditionally privileged under the provisions of section 4204, Comp. Laws Utah 1907; (3) that there is no allegation that the publication was malicious; (4) that there is no inducement or colloquium, nor any proper innuendoes in the complaint.

We cannot agree with the contentions made by defendants in any particular. We will assign our reasons in the order

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above mentioned, and as defendants, in their brief, present their objections to the complaint.

(a) The letter complained of as being defamatory expressly refers to and names the plaintiff. It is the plaintiff that is being spoken of, as the letter expressly states, and to 1 make the further express allegation that the words were written of and concerning the plaintiff would be mere surplusage.

(b) The second objection that the communication is conditionally privileged under section 4204, Laws Utah 2 1907, is equally untenable. Said section reads:

“A communication made to a person interested in the communication, by one who was also interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.”

If the publication complained of is to be regarded as conditionally privileged, it must be made under circumstances furnishing a legal duty or excuse for making it, or some additional facts must be alleged showing it to have been made without legal excuse. Townshend, Slander & Libel (4th Ed.) section 209. If the defendants were interested in the communication made, nothing appears on the face of the complaint to so indicate; nor is the relationship of the defendants shown to be such as would justify the conclusion that their motives were innocent; but, to the contrary, it is apparent from the pleadings that these unsolicited communications were made by the defendants merely on the assumption that the wife of the plaintiff would regard it as a friendly act on their part. Any legal excuse or moral duty the defendants may have had in writing the letters complained of certainly does not appear from the express allegations of the complaint itself. Nor can any such duty or excuse be reasonably inferred therefrom. Moreover, the complaint states that the matters contained in the letters were false, and were made with the intention that the wife of the plaintiff, “Mrs. J. W. Burton, should thereby be given to understand that the plaintiff was an immoral man

and living in illicit relations with the said Mrs. Agnes Grim, referred to in said letters."

(c) The language of the pleading is that "the matters contained in the foregoing letters were false and libelous," from which statement the only reasonable inferences to be drawn are that the communications were made with malice. 3

(d) As to the fourth objection made by the defendants, that the complaint contains no inducement or colloquium, nor any proper innuendoes. Section 2994, Comp. Laws Utah 1907, provides: 4

"In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the action arose." *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611; Townshend, Slander and Libel, section 308.

The face of the complaint, as we have heretofore stated, sufficiently shows that the publication complained of was concerning the plaintiff; that it was falsely made with the intent to effect an estrangement between the plaintiff and his wife, and "that Mrs. J. W. Burton should thereby be given to understand that this plaintiff was an immoral man and was living with the said Agnes Grim." While not artfully drawn, yet, under the authorities cited by both plaintiff and the defendants, as well as numerous other authorities examined by us, the amended complaint meets the essential requirements in stating a cause of action against the defendants, and we are of the opinion that the district court committed error in sustaining the defendants' demurrer to the amended complaint, and in dismissing the plaintiff's action.

It is therefore ordered that the judgment of the district court be reversed; that the cause be remanded to said court, with directions that the defendants' demurrer to the plaintiff's amended complaint be overruled, and that the defendants be permitted to answer. Appellant to recover costs.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

Appeal from Utah County, Fourth District

STEGGELL v. SALT LAKE & U. R. CO.

No. 3032. Decided August 1, 1917. (167 Pac. 237.)

1. RAILROADS—PERSONS ON TRACK—DUTY OF TRAIN OPERATORS. The operators of a train have a right to assume that a person of mature years, sound of body and mind, who is walking on the track, on a bright day, with an unobstructed view, toward the rapidly approaching train, which on his entering on the track was more than a mile away, will see and hear, as is his duty, the approaching train, and will be timely in removing himself to a place of safety. (Page 146.)
2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR COURT. Where there is but one reasonable inference to be drawn from the facts and circumstances disclosed by the testimony, namely, that the accident was solely and primarily due to deceased's contributory negligence, without opportunity on defendant's part, in time to have avoided the accident, contributory negligence becomes a question for the court, and is not within the province of a jury.¹ (Page 148.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by Alvina Steggell against the Salt Lake & Utah Railroad Company.

Judgment for plaintiff. Defendant appeals.

REVERSED.

Moore, Mitchell & Maginnis for appellant.

S. A. King for respondent.

CORFMAN, J.

• This was an action brought by plaintiff to recover damages for the death of her husband, alleged to have been caused by the defendant's negligence. Trial was had to a jury, resulting in a judgment for plaintiff. Defendant appeals.

The complaint, in substance, alleges the corporate existence of the defendant; that at all times mentioned therein the defendant was engaged in operating a railroad; that while

¹*Johnson v. E. G. Ry.*, 19 Utah, 77, 57 Pac. 17; *Holland v. O. S. L. E. R. Co.*, 26 Utah, 209, 72 Pac. 940; *Wilkinson v. O. S. L. E. R. Co.*, 35 Utah, 110, 99 Pac. 466.

Alfred Steggell, the husband of the plaintiff, was, on the 25th day of September, 1914, returning from his work at Lehi sugar factory to his home in American Fork City, along the public highway upon which the railroad track of the defendant had been lawfully laid, he was met by one of defendant's trains while walking upon a used footpath between the rails of defendant's track, and run over and killed; that the train was being operated at a high and dangerous rate of speed, without the ringing of a bell, blowing of a whistle, or the giving of other warning of approach; that the acts of defendant were careless, wanton, and negligent, and with reasonable diligence on the part of the defendant the accident would not have happened. The answer denies all liability for the accident, through negligence or otherwise, and affirmatively alleges trespass and contributory negligence on the part of the deceased.

The testimony given at the trial, briefly stated, shows, without conflict, that Alexander Steggell, the husband of plaintiff, prior to his death, lived in American Fork City, and had been employed at the Lehi sugar factory, about three miles westerly from his home in American Fork City. The defendant owned and operated an electric railroad running from Salt Lake City to Provo. Between the sugar factory and American Fork City the defendant's track was laid upon a public highway, and the main-traveled road from the sugar factory to American Fork City, going east, runs parallel to the defendant's track on the south side to a point about one-half mile west of the central portion of American Fork City, where it crosses defendant's track to the north side, and then again runs parallel to defendant's track through American Fork City. At the place of the accident there was a slough on each side of defendant's track. North of the track the slough came to the end of the ties. South of the track was a dry wagon road within a foot or eighteen inches of the railroad ties, and just beyond the wagon road was the south slough. On the day of the accident the deceased had left the sugar factory for his home, walking east toward American Fork City along defendant's track. The track was unobscured and ran in a

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straight line, practically due east and west on a one or one and one-half per cent. grade, from the east. The defendant's train was running west from American Fork City, and consisted of two cars, a motorcar, being a flat car with a motor and a cab on the rear or west end, and a tower car, also a flat car, with a tower built upon the top of uprights some distance apart, with cross-arms. The train was running, at about twenty-five or thirty miles per hour, the tower car to the front, the motorcar to the rear, of the train. The trainmen observed the deceased approaching on the track from the west for a distance of about a half mile, and continued to observe him until he was struck by the train. No attempt was made to check the speed or stop the train until after it was too late to avoid striking the deceased. At the time of the accident the deceased was thirty-nine years of age, in good health, strong and able-bodied, with the exception that his eyes were somewhat affected through the lime used at the factory where he was working, but his eyesight and hearing were good, and generally he was possessed of all his faculties. On the public road close behind the deceased were several of his fellow workmen in vehicles, who had observed the deceased walking on the track and the train approaching him. The deceased had his hat pulled down, as if to shade his eyes from the rising sun. They shouted at him. He turned his head, looked back toward them, threw up his hand, and was almost instantly struck by the train and killed.

Irving Ritchins, a witness on behalf of the plaintiff, testified that at the time of the accident he and Edward Robinson, also a witness in plaintiff's behalf, were riding in a buggy on their way to American Fork; that when he first saw the deceased he was about 3 poles ahead of them, and they were watching him all the time. He testified:

"I did not realize Mr. Steggell was in danger until he was pretty close. He was walking with his head down pretty low. That was his customary way of walking. With his head so low that he couldn't see anything, just the ground in front of him. He always had his hat down kind of low on his forehead. I didn't call out a warning because I thought he would step

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off the track; because I thought he would see the train and step off the track I did not try to warn him, and until I saw he was not going to get off. I was watching him and the train. It was clear weather."

Edward Robinson, a witness for the plaintiff, testified:

"Mr. Ritchins, who just testified, rode with me in a single buggy when we left the factory that morning. I first saw Mr. Steggell ahead of us, walking up the railroad track of the Orem Company about fifty rods ahead. I saw the train up in town. About a block from the depot. I could see the train all the time. We were about 115 feet behind Mr. Steggell when he was struck. I never noticed the train much after it passed. I never estimated the speed of trains or cars. I think when this train passed it was going thirty-five or forty miles an hour. I am just guessing at it. I didn't hear any whistle. I wasn't paying much attention to the whistle. The rattle of the buggy might have prevented me from hearing the whistle. I was giving most of my attention to my horse. I heard Mr. Ritchins holler to Mr. Steggell, and saw Mr. Steggell turn his head and look towards the west. Then he looked back and turned his head to the front and threw up his hand. I did not know whether Mr. Steggell was in danger of being hit by the train, and thought he would step off any minute. That is the reason I didn't yell. There was nothing in Mr. Steggell's appearance that would indicate to me that he was not going to step off the track."

William Bush, also a witness on behalf of plaintiff, testified:

"The train was pretty close to Mr. Steggell before I became alarmed myself. Maybe a couple of hundred feet. I got scared when he kept on along the track. I was afraid he did not see the train. I was afraid he was going to get struck. I yelled to him just before the train struck him. I didn't yell before because I did not have any idea but that Mr. Steggell would step off out of the way. I thought he had seen the train."

David Condor, a witness for the plaintiff, testified:

"Mr. Steggell continued to walk straight up the track. I did not see him vary his course at all. When I first saw the

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train it had got pretty close to the crossing. It was going fast then. I was watching Mr. Steggell particularly. I did not hear any whistle blow or bell sounded. Somebody hollered before Mr. Steggell was struck, and he turned his head and looked back and threw his hand up, and by that time he was gone. The train had struck him. There was a man on the front of the car. I noticed him just before the train struck Mr. Steggell. I saw him give the signal. He threw his hands quick. Gave the washout signal. There were several men on the car on the back. Just as quick as the signal was given they stopped the train. The train went about $4\frac{1}{2}$ telephone poles before they got it stopped. I did not observe the speed of the train slacken before the man gave the washout signal. I was watching Mr. Steggell, following him with my eye for some time. Towards the last I became alarmed for his safety, when the man hollered. I did not become alarmed until he got pretty close. If I had become alarmed before I would have given him some warning by yelling or whistling. Up to the time that he got to about one hundred to fifty feet of the train I thought he would step off out of the way. I figured that at any time within one hundred to fifty feet he would have plenty of opportunity to step off the track."

Frank Laub, a witness for the defendant, testified:

"I was on the train going west at the time of the accident. Mr. Frankland was at my right side. I saw Mr. Steggell walking up the track toward us as we were going west that day. He was walking at a good rate of speed for a man. When we got about fifty to thirty feet from him, I gave a violent stop signal. I watched him as he came toward us, and I should judge about 200 feet away he made a turn half-way around with his head, still walking. Stepped to the north side of the track and over the rail with his foot, then came back and threw up his hands and went under. He was on the south side of the track. The motion of his body looked as though he was going off the south side by his actions, and then stepped off to the north side, and then looked as though he was going to step off the north side, and then he stepped back to the track. I gave the stop signal as he stepped back from the

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south side of the track. I gave a shout myself, and Mr. Frankland whistled a violent whistle, and then there was a shout from the vehicle as near as I can recall all about the same time. The train was going then at the time it struck Mr. Steggell, or just before, about twenty or twenty-five miles an hour. It ran 180 feet as near as I can recall, after it struck him. I have a distinct recollection of the whistle blowing just before the accident. The train whistled good and loud 400 feet before it got to Mr. Steggell, and blew before it got to the crossing. It blew for the crossing."

Ronold Nicholes, another witness for the defendant, testified:

"I was on the motorcar just at the west end of the cab. I saw a man coming up the track, at first, about a mile and a quarter west of the station. He was walking straight up the railroad track. As he got close to the car, he moved to the north side; that is, the north rail. It looked as though he had seen the car and made for the north side of the track. Mr. Laub and Mr. Frankland were on the front end at the time of the accident."

Heber Frankland, defendant's witness, testified:

"I was on the train when Mr. Steggell was struck at American Fork. We were going from American Fork to Lehi that morning. We had twenty minutes to go a distance of three miles. I saw a man on the track when we were about the second street east of the crossing. The whistle was blown for the crossing when the train was about 150 or 200 feet away. The man was walking directly toward us, and we got pretty close to him. I naturally thought he was going to step off, and when I got about 200 feet from him, I was standing right on the edge of the car. I yelled and I whistled, and the same time a yell and a whistle came from the other way. It sounded to me it came from the team. The man turned his head. At that time he was walking close to the south rail, right along inside and at that time I gave the emergency signal. He took, I should judge, about three steps diagonally across the track, came to the rail, stepped over with his left foot, took one more step, and threwed his hands up. I reached down to try and

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catch him, but my grasp was not strong enough. At the time I gave the signal to stop the train was going about twenty to twenty-five miles an hour. I know the signal was obeyed by the jar of the train and the sound of the brakes immediately. I had already heard a short blast of the whistle. I counted the rails from the train back to where the body was, and it was between six and seven rail lengths. The condition of the roadway on either side of the railroad track at that point was such that Mr. Steggell could have stepped off on either side and been safe."

At the conclusion of plaintiff's testimony the defendant moved for a nonsuit on the grounds: (1) That no negligence on the part of the defendant had been shown; and (2) should the court conclude that negligence had been proven, then the evidence established that the deceased was guilty of contributory negligence as a matter of law. The motion was denied. The defendant also requested the trial court to instruct the jury to return a verdict against the plaintiff in favor of the defendant, "no cause of action." This request was refused. Motion for a new trial was made and denied.

The foregoing rulings of the trial court, together with the court's refusal of admission and rejection of certain testimony, are assigned as error, and are apparently the principal grounds contended for and relied upon by the defendant for a reversal of the judgment of the trial court.

After carefully reviewing the record, we do not deem it necessary to here enter upon a discussion of the questions arising under the rulings of the court in the admission nor in the exclusion of testimony at the trial other than to say we think that, in that regard, the defendant was precluded from having a fair trial, nor that the trial court in its rulings committed errors prejudicial to the defendant. The more serious questions arise from defendant's contention that the trial court committed error in denying defendant's motion for a nonsuit, and in refusing defendant's request for a peremptory instruction to the jury to return, under the evidence, a verdict against the defendant and in favor of the plaintiff, no cause of action. These, practically, involve but

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one question: Whether or not the plaintiff, under the facts and circumstances disclosed by the record, is precluded as a matter of law from claiming damages at the hands of the defendant.

After reviewing all the evidence and quoting at some length the testimony of witnesses, both for plaintiff and defendant, as premises for this court's decision, we do not feel called upon to discuss at any great length the facts and circumstances surrounding the accident complained of by the plaintiff in this action. Conceding, as contended for by plaintiff, that the deceased and others were accustomed to walk upon the defendant's track, with a knowledge and acquiescence on the part of the defendant, confessedly the track itself was a place of great danger, necessarily and rightfully used by the defendant in the operation of its trains. The uncontradicted testimony of the defendant's train crew testifying at the trial shows that the deceased was in plain view, and observed by them for at least a half mile while the defendant's train and the deceased were approaching each other; that the day was bright and the view unobstructed. They testified, as did the witnesses for the plaintiff, that they assumed the deceased would step off the track in time to avoid injury to himself. It is conclusively shown that the deceased was able-bodied, of sound mind, and possessed of all his faculties; that he could have readily avoided the accident by taking a step or two either to the right or left of the track to a place of perfect safety, an absolute and continuing duty we think he owed to himself right up to the time he met and was run against by defendant's train; a duty, we think, the defendant momentarily expected he would perform, as did the many witnesses who observed him walking on the track while the defendant's train was approaching him.

To say that, under the circumstances and conditions surrounding this accident, as disclosed by the undisputed testimony, the defendant was negligent, or, seeing the plaintiff's position and conduct while walking toward the approaching train, it recklessly or wantonly failed in its duty toward the deceased, is to say that, in every case where a footman is seen

approaching a moving train it becomes the duty of the train crew or operators in charge to at once assume that no duty rests upon the footman to take any responsibility on himself or to exercise any care or precaution for his own personal safety and protection; that the operators of the train must bring it to a standstill until the footman becomes mindful of the fact that he has placed himself in a dangerous position and concludes to step aside and permit the train to pass and subserve, in some measure, the convenience and safety of the public. Where, as here, the undisputed facts are the deceased, being of mature age, sound of body and mind, without necessity chooses to enter and walk upon the defendant's track when the day was bright, the view unobstructed for more than a mile before him, and deliberately walk along the track in view of a rapidly approaching train which was, upon his entering the track, more than a mile away, by every reasonable hypothesis the defendant had the right to assume that he would see and hear, as it was his duty to see and hear, the approaching train, and that he would be timely in removing himself to a place of safety and avoid injury. *Elliott on Railroads*, vol. 3, section 1095; *Louisville & N. R. Co. v. Weiser's Adm'r*, 164 Ky. 23, 174 S. W. 734.

The plaintiff strenuously contends that the defendant was negligent in failing to ring the bell, blow the whistle, or to give other warning or signal of approach; but as against the testimony of witnesses in behalf of plaintiff, who at most merely undertook to say they did not hear any signal, positive and convincing testimony appears in the record that the whistle was blown and the bell sounded in ample time to have warned the deceased of the approaching train. Conceding, for argument sake, no signal was given of the approaching train, under the attending circumstances as disclosed by the record it still remains inconceivable that plaintiff would, after placing himself in the perilous position of walking upon a railroad track with which he was familiar, knowing that trains were liable to be passing at any time, remain wholly indifferent to the attending risk and fail to exercise any precaution whatever for his own safety.

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Necessarily, after carefully reviewing all the testimony and the authorities cited by both parties, we are forced to the conclusion that the application of the defendant for a nonsuit in this action should have been granted by the trial court, as should likewise the defendant's request for a directed verdict, "no cause of action," been complied with.

We have carefully examined the authorities cited in respondent's brief, and not in a single case are the facts and circumstances, as disclosed, found to be analogous to the case at bar, nor does the law as there announced divert 2 from the well-established doctrine that where there is but one reasonable inference to be drawn from the facts and circumstances disclosed by the testimony, and that is the accident complained of was solely and primarily due to the contributing negligence of the deceased, without opportunity on the part of the defendant in time to have avoided the accident, contributory negligence at once becomes a question of law for the court, and is not within the province of the jury to pass upon. *Johnson v. R. G. Ry.*, 19 Utah, 77, 57 Pac. 17; *Holland v. O. S. L. R. R. Co.*, 26 Utah, 209, 72 Pac. 940; *Wilkinson v. O. S. L. R. R. Co.*, 35 Utah, 110, 99 Pac. 466; *Glascocock v. Railroad Co.*, 73 Cal. 137, 14 Pac. 518; *Imler v. Northern Pac. Ry. Co.*, 89 Wash. 527, 154 Pac. 1086, L. R. A. 1916D, 702 Ann. Cas. 1917A, 933; *Barber v. East & W. R. Co.*, 111 Ga. 838, 36 S. E. 50; *Ward v. Atlantic Coast Line*, 167 N. C. 148, 83 S. E. 326; *Iowa Central R. Co. v. Walker*, 203 Fed. 685, 121 C. C. A. 579; *Campbell v. Kansas City, Ft. S. & M. R. Co.*, 55 Kan. 536, 40 Pac. 997; *Hart v. Northern Pac. R. R.*, 196 Fed. 180, 116 C. C. A. 12.

It is ordered that the judgment of the trial court be reversed. Costs to appellant.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

Appeal from Utah County, Fourth District

BEESLEY v. BOARDMAN

No. 3076. Decided August 1, 1917. (166 Pac. 991.)

1. **APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.** The Supreme Court in a law case cannot interfere with the findings and judgment, where there is ample evidence to support the findings. (Page 150.)
2. **APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.** The Supreme Court in an equity case cannot interfere with the court's finding of fact where the evidence on the controlling question is not only in sharp conflict, but justifies finding as the court did. (Page 150.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by John W. Beesley against Thomas Boardman.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Harvey Cluff for appellant.

J. H. McDonald for respondent.

FRICK, C. J.

The plaintiff, in substance, alleges in his complaint that in May, 1914, at his request, the defendant loaned the plaintiff the sum of \$100; that the plaintiff at that time deposited with the defendant as security for said loan 50,000 shares of the capital stock of a certain mining corporation, which stock was to be returned to the plaintiff upon the payment of said loan with legal interest; that prior to the commencement of this action the plaintiff duly tendered to the defendant the amount of said loan, together with legal interest thereon in lawful money, and demanded from the defendant the return of said 50,000 shares of stock; that said defendant refused to accept the amount of said loan with legal interest, and refuses, and still refuses, to return said stock to the plaintiff; that said stock is of the reasonable value of \$5,000; that plaintiff is ready and willing to repay the amount of said loan with legal interest, and tenders the same to him in court. Plaintiff

prayed judgment for the return of said stock, or that, in lieu thereof, he recover judgment for the sum of \$5,000.

The defendant, in effect, denies the allegations of the complaint and, as an affirmative defense, alleges that he, on the 18th day of May, 1914, purchased the stock in question from the plaintiff for the sum of \$100; that he had advanced certain amounts of money in paying assessments upon said stock, etc. The defendant also alleges other facts in his answer which are, however, not material here.

A trial to the court without a jury resulted in findings of fact and conclusions of law in favor of the plaintiff. The district court found the facts substantially as they are alleged in the complaint, except that the court found that, in view that the defendant has all of said stock in his possession and can make return thereof to the plaintiff, it is not necessary to find its value, and the value thereof was not found. The court further found that the defendant had paid an assessment on said stock amounting to \$51.70. The court entered judgment requiring the plaintiff to pay to the defendant the amount of said loan, with legal interest, and also required him to pay to the defendant the amount advanced on said stock for assessment with legal interest, and, upon such payment being made by plaintiff to the defendant, that the latter return said stock to the plaintiff.

The defendant appeals and insists that the court erred in its findings of fact, conclusions of law and judgment. While the findings of fact are assailed, yet no specifications are made wherein the evidence is insufficient to sustain 1, 2 the findings. If the findings of fact remain, the exceptions to the conclusions of law and the judgment must necessarily fail. If we regard this case as one in law, then we are powerless to interfere with the findings and judgment, for the reason that there is ample evidence to support the findings of fact. If, upon the other hand, we regard it as an action in equity, then again we cannot interfere with the court's findings, for the reason that evidence upon the controlling question, namely, whether the transaction between the parties constituted a loan and a pledge of the stock, without

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fixing a time for payment, or whether it constituted sale thereof by the plaintiff to the defendant, as claimed by the latter, is not only in sharp conflict, but, in our judgment, the district court was justified in finding that the evidence upon that question preponderated in favor of the plaintiff. At all events the district court was in a better position than are we to weigh the evidence and to pass upon the credibility of the witnesses. In any event, therefore, the findings are not so clearly against the evidence that we would be justified in interfering, although we treat the case as purely equitable. We remarked that we have less hesitancy in arriving at the foregoing conclusion in view of the fact that the district court in its judgment has fully protected the legal rights of both parties. We are all of one mind that the record in this case shows no good cause for interference, and hence the judgment is, in all respects, affirmed, with costs to respondent.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

ANDERSON v. HAMSON et ux.

No. 3015. Decided August 1, 1917. (167 Pac. 254.)

1. WATERS AND WATER COURSES—NATURAL STREAMS—CONVEYANCE OF RIGHT. In view of Comp. Laws 1907, section 1288x32, a deed to land in statutory form, without reservation of the water, conveys whatever right the grantor has to the water appurtenant to the land. (Page 153.)
2. WATERS AND WATER COURSES—SURFACE STREAMS—RIGHT TO USE—PRESCRIPTION. Where a landowner has acquired the right to use all of the water of a stream, it is unnecessary, in a suit to establish his right, to determine the exact quantity in second feet or acre feet which he was entitled to use.¹ (Page 154.)

Appeal from District Court, First District; *Hon. N. J. Harris*, Presiding Judge.

¹ *Elmer v. McCune*, 29 Utah, 320, 81 Pac. 159; *Nephi Irrigation Co. v. Fickers*, 15 Utah, 374, 49 Pac. 301; *Id.*, 20 Utah, 310, 58 Pac. 836; *Nephi Irrigation Co. v. Jenkins*, 8 Utah, 369, 31 Pac. 986; *Salina Creek Irr. Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac. 578.

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Suit by L. J. Anderson against Joseph Hamson and wife.

From an order dismissing the action, plaintiff appeals.

REMANDED with directions to vacate and set aside the judgment.

Le Roy Young for appellant.

B. C. Call for respondents.

THURMAN, J.

This is a controversy concerning the waters of a certain unnamed spring in Box Elder County. Both plaintiff and defendants claim title to the water, and seek by this action to have their respective titles quieted. The complaint and answer are in the form in common use in the cases of this kind. The evidence shows that the plaintiff is the owner of about twenty-four acres of meadow and pasture land situated in the N. E. $\frac{1}{4}$, Sec. 15, Tp. 9 north R. 2 West, Salt Lake meridian, in Box Elder County; that defendants are the owners of 4.09 acres about 80 rods east of plaintiff's land, and the stream of water in question rises in meadow land about the same distance east of defendants' land and flows westerly through their land to the land of plaintiff, where the same has been used for irrigation by plaintiff and his predecessors in interest. The evidence also tends to show that all of the lands above described, both plaintiff's and defendants', are arid and unproductive without artificial irrigation, but when irrigated the land produces valuable crops of hay and grass for pasture.

At the close of plaintiff's evidence defendants moved for a nonsuit upon the grounds, in substance: (1) That the evidence failed to show the quantity of water, if any, to which the plaintiff was entitled; (2) that plaintiff came into possession of his land by deed in 1911, and that the deed conveyed no water; and (3) that his grantor did not claim to own any water at the time he executed the deed. The trial court granted the motion and dismissed the action. Plaintiff appeals.

The undisputed evidence shows that plaintiff's grantor, one Craghead leased the land in question, including other lands, from the Deseret Savings Bank in 1898. Irrigating ditches were then in existence upon the lands, and Craghead used the same and applied the water in question upon 1 the land for the production of hay and pasture; that he used the water in the same way and with the same effect in 1899, and in 1900 purchased the land outright; that he continued to so use the water upon the land from year to year until 1910, when he contracted to sell the land to the plaintiff, and in 1911 did sell it to plaintiff and conveyed the entire tract by warranty deed. The deed is in the statutory form, without reservation of the water, and, by virtue of the statute, it conveyed whatever right the grantor had to the water appurtenant to the land. Comp. Laws 1907, section 1288x32. The beneficial use of the water upon the land was not only proved by the plaintiff, but affirmatively admitted by defendants. After the plaintiff purchased the land, as stated, he continued to use the water in the same way during each and every year. He sold part of the tract, and at the commencement of this action had only twenty-four acres for which he claims water. The water in controversy, in the early part of the irrigation season, commingles with the high waters of Box Elder creek, of which it is a tributary, during which period plaintiff and his grantor were enabled to raise a crop of hay. After the waters of Box Elder creek are diverted by other appropriators in the spring, the water in question is plaintiff's sole reliance for irrigation. By means of this he sometimes raises a second crop of hay and, in any event, produces grass for pasturage. It appears from the evidence that both plaintiff and his grantor used all of the water in dispute after the waters of Box Elder creek failed to reach the land, except on rare occasions, when it was obstructed and diverted by parties other than the defendants. In the instances referred to plaintiff, or his grantor, as the case might be, would remove the obstructions from the stream and resume the use of the water to the extent of his necessities. The evidence shows that ordinarily all of the water, and sometimes more, was necessary to properly irrigate the land. and

that it was all used except for the occasional interruptions and during the surplus flow of Box Elder creek above referred to.

In April, 1915, the defendants for the first time, as the evidence shows, placed a dam in the stream and diverted the water to and upon their own land, and thereby prevented it from flowing down to plaintiff. Plaintiff was needing the water at the time. He removed the dam and let the water down, but defendants again obstructed the stream and prevented the water from reaching plaintiff's land. These interruptions continued until finally this action was commenced to determine the rights of the parties to the water. According to the undisputed evidence as it stands in the record, the defendants had never used the water until the date above mentioned. If they had any right to the water at all, it is not disclosed by the evidence submitted to the court. There is evidence that third parties sometimes used a portion of the stream, but none that the defendants ever did until 1915, on the occasion referred to.

It is difficult to see upon what grounds the court sustained the motion for nonsuit. It is quite clear from the evidence that plaintiff and his grantor, during a period of seventeen years prior to the commencement of this action, 2 especially as against the defendants, used, and acquired the right to use, all of the waters in controversy for beneficial purposes. It is equally clear that all of the water was necessary for the irrigation of the land except when the waters of Box Elder creek would reach the land and contribute to the supply. Having acquired a right to the use of all the water of the spring, it was unnecessary at the trial to establish the exact quantity in second feet or acre feet which, under our law, are the standards of measurement. The purpose of fixing a standard of measurement is to determine exactly the quantity of water to which a party is entitled; but where a party alleges and proves that he is entitled to all the waters of a certain stream, certainly, as against his adversary who proves no right whatever, such allegation and proof is sufficiently certain as to quantity upon which to base a judgment. It cannot be possible in such a case that it is necessary to use one of the

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standards of measurement above referred to, or even determine the duty of water. If a party shows he has acquired the right to the use of all the water, as against his adversary, by applying it to a beneficial use, nothing could be more definite or satisfactory as a basis for a decree. *Elmer v. McCune*, 29 Utah, 320, 81 Pac. 159.

Respondents cite *Porter v. Pettengill et al.*, 57 Or. 44, 110 Pac. 395, assuming that it is similar to the present case. It is sufficient to say there is no analogy between that case and the case at bar. The decree in that case was indefinite and uncertain in several particulars. Plaintiff claimed all the water in the dry season. This was indefinite. The quantity of land was not shown. This was indefinite. Nor was there any allegation or proof that any particular land needed irrigation. Besides this, it has not been the practice of this court to dismiss an action or turn a party out of court, as was done in that case, if the party established the fact that he was entitled to water, however indefinite or uncertain the quantity might be. On the contrary, the practice has been in such case to remand the case with directions to the trial court to take further testimony as to the quantitative rights of the parties. *Nephi Irrigation Co. v. Vickers*, 15 Utah, 374, 49 Pac. 301; *Id.*, 20 Utah, 310, 58 Pac. 836; *Nephi Irrigation Co. v. Jenkins*, 8 Utah, 369, 31 Pac. 986; *Salina Creek Irrigation Co. v. Salina Stock Co.*, 7 Utah, 456, 27 Pac. 578. In this case the evidence is certain that plaintiff needed and was entitled to all the water in controversy whenever the waters of Box Elder creek failed to reach his land. This was a definite point, and clearly susceptible of ascertainment at any season of the year.

It is not our province in this case to determine that plaintiff is entitled to all the water, except as against the defendants. If other persons have acquired rights, this decision, of course, will not in any manner foreclose them or affect their rights. This is an equity case, and this court has the power, and it is its duty, to determine the facts as well as the law. Numerous cases have been cited by both plaintiff and defendants relating to the question of uncertainty and indefiniteness in respect to the quantity of water claimed or proven. These cases

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are not applicable to a case like this for the reasons above stated. Neither is it necessary to distinguish or review other cases cited which merely go to the question of beneficial use (a point not in dispute in the case at bar) or which confine the appropriator to an economic use. These are elementary principles in the law of irrigation, and are no longer open to controversy.

The conclusions at which we have arrived are based upon the conviction derived from the evidence that the water was applied by plaintiff and his grantor to a beneficial use; that it was all necessary when economically used, and that, as against the defendants, plaintiff had acquired a right to all of the water at the time the defendants commenced interfering with his use.

The case is therefore remanded, with directions to the trial court to vacate and set aside the judgment of nonsuit entered herein, and to prepare findings of fact and conclusions of law in accordance with the views herein expressed, and enter a decree quieting the title to all of the waters of said spring in the appellant. Appellant to recover his taxable costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

IN RE FRANDSEN'S WILL

No. 2944. Decided August 6, 1917. (167 Pac. 362.)

1. **APPEAL AND ERROR—FINDINGS OF COURT—REVIEW.** In a law case, the findings of the trial court, if supported by some substantial evidence, are binding, and cannot be disturbed on appeal. (Page 159.)
2. **WILLS—LOST WILLS—PRESUMPTIONS.** When it is shown that testator made a will which could not be found at his death, ordinarily the presumption arises that he himself destroyed it for the purpose of revoking it. (Page 162.)
3. **WILLS—LOST WILLS—PROOF—SUFFICIENCY.** Under Comp. Laws 1907, section 3810, which provides that no will shall be proved as a lost or destroyed will unless it is proved to have been in existence at the time of the death of testator or is shown to have been fraudulently destroyed in his lifetime, nor unless its provisions are clearly proved, proof that testatrix in 1900, while she was sane, made the lost will,

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and that it was in existence eight months after she became insane, was sufficient for admission of the will to probate. (Page 165.)

4. EVIDENCE—LOST WILLS—RECORDS. The records in the county clerk's office of a lost will were not competent independent evidence of the provisions of the will. (Page 166.)
5. WILLS—CONTEST—GROUNDS—OMITTING BENEFICIARIES. That the will made no provision for protestant, testatrix's granddaughter, was not a ground for contest, but a matter which could be presented upon final distribution as provided for by Comp. Laws 1907, section 2762. (Page 166.)

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In the matter of the probate of the wills of Karen Frandsen, Deceased.

Decree refusing probate. The proponent of two of the wills appeals.

REVERSED and REMANDED, with directions.

Stewart, Stewart & Alexander for appellant.

S. A. King and *J. W. Cherry* for respondent.

FRICK, C. J.

This is a proceeding involving three different and independent wills. One Karen Frandsen, a resident of Carbon County, Utah, of the age of seventy-seven years, died on the 4th day of March, 1915, leaving surviving her five sons and one daughter, all of whom were of lawful age. She also left surviving her eight grandchildren, the children of a deceased son, all of whom, except one, were minors; and she also left surviving her another grandchild who was the daughter of another deceased son. The father of the eight children mentioned died after the several wills hereinafter mentioned were executed, but the father of the last-mentioned grandchild had died before their execution. Under the provisions of our statute it is important to keep in mind the facts last above stated. On the 17th day of March, 1915, one of the sons presented a writing for probate which purported to be the last will and testament of the de-

ceased. The alleged will was dated July 5, 1911, and a copy was attached to the application. The daughter of the deceased filed a protest to the allowance of that will to probate upon the grounds that the same was not executed as provided by our statute, and that it was not the last will and testament of the deceased. In connection with her protest she also presented what purported to be the last will and testament of the deceased dated July 27, 1912, or nearly a year after the first will presented for probate was dated. A copy of that alleged will was attached to her application. One Hannah Jorgensen, the daughter of the son of the deceased who died before any one of the wills was executed, also filed a protest to the allowance of either one of the two alleged wills to probate upon the ground that she is a grandchild of the deceased, and that she was not mentioned in said wills, and hence, in so far as said wills affect her interest in the estate of the deceased, they are of no effect under the provisions of Comp. Laws 1907, sections 2761, 2762. She, however, also assailed both of said proposed wills upon the further ground that at the time the same were executed the testatrix was insane and mentally incapacitated from making a valid will. Four of the surviving sons also filed a protest against the probate of the will of June 27, 1912, presented by the daughter of the deceased, upon the ground that the testatrix at said time was insane and mentally incapacitated, and that that will was obtained or was the product of fraud and undue influence practiced on the deceased by the daughter aforesaid. After all of the protests had been filed, and after the court had indicated that at the times the will dated July 5, 1911, and the one dated July 27, 1912, were executed the testatrix did not possess sufficient mental capacity to make a will, the daughter of the deceased presented another will dated July 19, 1900, and asked that the same be admitted to probate as a lost will, and upon the further ground that the same had been fraudulently destroyed. After a hearing of all the protests the court found against all of the wills, and refused to admit any of them to probate. The material findings of the court are as follows:

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"That the purported will of said deceased tendered and offered for probate by Anna Frandsen Horr, alleged to have been executed on the 19th day of July, 1900, was not in existence at the time of the death of said deceased, and was not fraudulently destroyed during the lifetime of said deceased, and was not surreptitiously, fraudulently, or without the knowledge of said deceased, or with the view of defeating the intentions and purposes of said deceased or at all destroyed by George G. Frandsen, a son of said deceased, or by any other person, and said will was not in the possession of the said George G. Frandsen, at any time. That at the time of the purported execution of the will offered for probate by George G. Frandsen, to wit, the 5th day of July, 1911, and for a long time prior thereto, the said Karen Frandsen was not of sound mind or memory, but that her mind was weak, debilitated, and deranged to such an extent that she was incapacitated from executing or understanding a will. That at the time of the purported execution of the will offered for probate by Anna Frandsen Horr, to wit, the 27th day of June, 1912, and for a long time prior thereto, the said Karen Frandsen was not of sound mind or memory, but that her mind was weak, debilitated, and deranged to such an extent that she was incapacitated from making, executing, or understanding a will."

The court also found that the will of June 27, 1912, was obtained by undue influence practiced on the testatrix by the proponent of that will, but that finding, for reasons herein-after appearing, is of no controlling influence.

The proponent of the will of June 27, 1912, assails the court's findings, and insists that the evidence is insufficient to justify a finding that the testatrix was insane or mentally incapacitated at the times aforesaid, and she also assails the findings respecting the issue of undue influence. We 1 have carefully read the evidence produced by all the interested parties, and while the evidence respecting the mental capacity of the deceased is not as convincing, when viewed in the light of all the circumstances disclosed by the evidence, as it might be, yet there is some substantial evidence in support of the court's findings on that issue. In view, therefore, that this

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is a law case and that we are bound by the findings, if supported by some substantial evidence, we may not interfere with those findings. The evidence upon the issue of undue influence is weak and unsatisfactory, yet, as before stated, that finding is not of controlling influence, and hence needs no further consideration.

We shall consider only such facts as have a controlling influence upon the result, and therefore shall eliminate everything else from consideration.

In view of the court's findings, therefore, both the proposed will of July 5, 1911, and of June 27, 1912, must fail. This leaves only the proposed will of July 19, 1900, to be considered. The probate of that will is controlled by Comp. Laws 1907, section 3810, which reads as follows:

"No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."

As appears from the court's findings, the will of July 19, 1900, was also disallowed. The question we must determine, therefore, is whether the court's findings respecting that will are supported by evidence, and whether its conclusions of law with respect thereto are sound. The facts which must control upon that question are not in dispute. In substance they are that on July 19, 1900, the testatrix, then of sound and disposing mind and memory, duly executed the will last proposed for probate, and, pursuant to the provisions of Comp. Laws 1907, section 2740, deposited the same with the county clerk of Carbon County; that thereafter, and before any of the other proposed wills were executed, the testatrix, at least once, in the presence of one witness, saw the will in the county clerk's office, and she then, and at other times, according to the evidence, expressed herself as being satisfied with its provisions; that the will was recorded in a book in the county clerk's office by a young lady who held some official position in said office; that the will was last seen in the county clerk's office

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by the witnesses who testified on the hearing, in March, 1912, and its contents were then examined by them. One of the witnesses was an attorney who examined the will for the purpose of preparing the proposed will dated June 27, 1912, and which will he prepared, and the other witness was the husband of the proponent of the will of 1900. The will as recorded in the clerk's office was also produced in court, but the court refused to admit it in evidence. As we have seen, the court found that on July 5, 1911, and on June 27, 1912, the testatrix "was not of sound mind or memory," and that she then was "incapacitated from making, executing, or understanding a will." We thus have a case where the will in question was shown to have existed some eight months after the testatrix had become insane, as found and declared by the court, which finding and declaration, as we have seen, is binding upon us and upon the parties in interest.

The question therefore arises whether the court's finding that the will "was not in existence at the time of the death of said deceased" is supported by the evidence. The evidence that the will was in existence at least eight months after July 5, 1911, when the testatrix was found and declared to be insane, is not disputed. Nor is there any dispute regarding the fact that at, and for some time before, the trial the will could not be found in the clerk's office or elsewhere. No one testified who saw it after March, 1912, and no one seemed to know where it was. In other words, the evidence discloses that the will could not be found. The court, therefore, found that it did not exist at the time stated in the finding. This case is unique in that the will in question, beyond all dispute, was shown to be existing long after the testatrix possessed the capacity either to make or to revoke a will. The purpose of section 3810, *supra*, is to prevent the probate of wills that have been revoked by the testators and also to prevent probate of wills, unless it is shown that the proposed will existed at the death of the testators. The purpose of the statute is to prevent spurious wills from being proved.

When it is shown that the testator made a will, but that it could not be found at his death, then, ordinarily, the pre-

sumption arises that he himself destroyed it for the purpose of revoking it before his death. The provisions of section 3810, supra, have been adopted in a number of 2 states. Section 1339 of the California Code of Civil Procedure is precisely like our section 3810, supra. The statute of New York is also like ours, except that in the New York statute a correct copy or draft of the will, in establishing its provisions, is equivalent to one witness. The same is the case in the state of Washington. The statute was under consideration in California in *Estate of Kidder*, 66 Cal. 487, 6 Pac. 326, and in *Estate of Patterson*, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, and again in *Estate of Camp*, 134 Cal. 233, 66 Pac. 227. In the Kidder Case it was held that where a will had been handed to the testatrix, who was ill at the time, and that she either cast it into an open fireplace, or it accidentally fell from her hands into the open fireplace and was destroyed, and she thereafter died without doing anything with respect thereto, the will, as a matter of course, ceased to exist, and that it was not fraudulently destroyed within the purview of the statute, and hence probate was properly denied. The statute in another proceeding was again before the Supreme Court of California in *Estate of Camp*, supra, and the Supreme Court then said:

"This provision of the Code, being remedial in its nature, is to receive a liberal construction, and is held to apply as well to a mutilated will, or one in which some of its provisions have been destroyed."

The only purpose in referring to that case is to show that the statute is regarded as remedial, and hence should be given a fair and reasonable construction and application. That is, if the whole purpose of the statute can be subserved, the court, in furtherance of justice, may well give its provisions a fair and even a liberal construction rather than a narrow and strict one, when to do that would be unfair or unjust. The doctrine of liberal construction is exemplified by the Supreme Court of California in *Estate of Patterson*, supra. It was there shown that after the destruction of the will and the death of the testatrix the statute was amended so as to include the destruction of wills by a public calamity as well as those destroyed by

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fraud. It was accordingly held that the amendment should apply, although the will was destroyed and the testatrix had died before the amendment was adopted.

As before stated, the statute is also in force in various other states where it has been the subject of judicial consideration. Among other cases we refer to the following: *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *In re Cosgrove's Will*, 31 Misc. Rep. 422, 65 N. Y. Supp. 570; *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442; *Collyer v. Collyer*, 110 N. Y. 481, 18 N. E. 110, 6 Am. St. Rep. 405; *In re Miller's Will*, 49 Or. 452, 90 Pac. 1002, 124 Am. St. Rep. 1051, 14 Ann. Cas. 277; *In re Harris' Estate*, 10 Wash. 555, 39 Pac. 148; *In re Reiffeld's Will*, 36 Misc. Rep. 472, 73 N. Y. Supp. 808.

In *Schultz v. Schultz*, supra, the Court of Appeals of New York considered the question at some length. In that case the testator executed his will on October 23, 1863. He left it for safe-keeping with one of the beneficiaries, who placed it in his trunk. The testator died on September 20, 1865, nearly two years after he had executed the will, and left it with the custodian as aforesaid. When the testator died the custodian supposed the will was in the trunk where he had placed it, but it was not there, and could not be found. It was shown that the testator did not have the will in his possession after he placed it with the custodian, and before his death. The Court of Appeals, after quoting the statute, which is precisely like ours, except that it contains the additional provision that a correct copy or draft of the will shall be deemed equivalent to one witness, says:

"If the will had remained in the custody of the testator, or if it had appeared that, after its execution, he had access to it, the presumption of law would be, from the fact that it could not be found after his decease, that the same had been destroyed by him. * * * As to the existence of the will, at the time of the testator's death, we have the conceded fact of the execution of the will, and of the deposit of the same with a custodian for safe-keeping. The custodian testifies, that, after it was delivered to him, at the time of its execution, he never parted with its possession, but locked it in a trunk, and supposed it was there at the time of the testator's death. Upon search made for it, after his death, it could not be found. There is not a scintilla of evidence, or a circumstance, to show that the testator ever had possession of the will, after its

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execution and delivery to the custodian. It follows, therefore, as a legal conclusion, that the will was in existence at the time of his death (if not then fraudulently destroyed or lost), in which event, it being now lost or destroyed, either by accident or design, it should be established as a valid will. If the will was not in existence, at the time of the testator's death, then it follows equally clear, that it must have been fraudulently destroyed in his lifetime or lost. The fraud mentioned and referred to in this connection is a fraud upon the testator, by the destruction of his will, so that he should die intestate, when he intended and meant to have disposed of his estate by will, and never evinced any change of that intent. It is undeniable, from the facts in the record, that either this will was in existence at the time of the death of this testator, or that it had been destroyed in his lifetime, without his knowledge, consent, or procurement, or accidentally lost. If so destroyed, it was done fraudulently as to him, and, in judgment of law, the legal results are the same precisely as if it had continued in existence up to the time of his death. In either contingency, it was his last will and testament, and its loss or destruction, either by accident or design, being proven, it is the duty of the court to establish it as the will of this testator. The judgment of the Supreme Court should be reversed, and a new trial ordered, costs to abide the event."

We have quoted copiously from the Schultz Case because what is there said reflects the opinions of the courts in all the other cases we have cited.

In the case cited from Oregon, as well as in the one from Washington, evidence regarding the existence of the will at the death of the testator was circumstantial and in some respects very inconclusive, yet it was held that the wills should be admitted to probate. In the Oregon case the judgment of the lower court admitting the will to probate was affirmed, while in the Washington case the judgment of the lower court denying the will to probate was reversed, and it was ordered that the will be admitted to probate. The facts in those cases were different from the facts in the case at bar only in that, in those cases, the testators died sane, while in this case the finding is conclusive that the testatrix died insane. As we have shown, however, in the case at bar the evidence is conclusive that the will was in existence a long time after the testatrix was insane as found and declared by the court. If, therefore, the testatrix was insane and thus incompetent to make a will, she was likewise incompetent to revoke one. Woerner, Law of Decedent Estates, section 204; *Allison's*

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Devisees v. Allison's Heirs, 37 Ky. (7 Dana) 91, where the law in the headnote is stated thus:

"It requires the same capacity to revoke a will as to make one."

That is elementary, and we think no one will dispute it. In the cases we have cited it is held that in case it is shown that the testator has power to execute a will, and has left it with a depositor, and that he did not have access to it after its deposit and before his death, the presumption that he destroyed it for the purpose of revoking it is overcome. That is common sense, and, we may add, common experience.

Now, in this case it is conclusively shown that the will existed for a period of about eight months after the testatrix became insane and incapacitated from either making or revoking a will. True, the testatrix continued her physical existence. Her mind, however, the one thing 3 necessary to make or revoke a will, was gone. The testatrix was therefore mentally dead, and hence incapable of doing any act which required mental consent or concurrence. It was therefore legally impossible for her to have revoked the will of July 19, 1900. It is conclusively proved, therefore, that she did not revoke it. It also appears that no one either could or did destroy it by her direction, or with her consent, since legally she could give neither. What, then, are the legitimate, and only legitimate, inferences that may be deduced from the undisputed facts? They are: (1) That the will existed at the mental death of the testatrix; and (2) that if it was destroyed, it was without her knowledge or consent, and therefore its destruction could not revoke it. If, therefore, it had been conclusively shown that the will of July 19, 1900, continued to exist nine months after the physical death of the testatrix, no one would doubt or question the right of the proponent thereof to have the same admitted to probate, in view that the evidence is also undisputed that the testatrix was sane in July, 1900, and that the will was in all respects executed as required by our statute. The only difficulty, therefore, lies in the fact that the testatrix continued to live until 1915. While she continued to live physically, she, however, was as much dead mentally for the purpose of making or revoking a will as she now is. The mere fact that she lived

is of no consequence now. Nor is that fact of any importance so far as the purpose of the statute is concerned. When it is once shown that a testator is bereft of the power either to change or to revoke an existing will, and it is further shown, as here, that the will existed long after the power to revoke passed from the testator, then such a will fairly comes within the provision of section 3810, *supra*, and should be admitted to probate the same as though the testator had physically died. The legal effect in the one case is precisely the same as in the other.

We are of the opinion, therefore, that the court erred in its finding respecting the existence of the will, and certainly erred in its conclusion of law and judgment denying the will of July 19, 1900, to probate. That is, the finding respecting the existence of the will, then construed as the court construed it, is erroneous.

Counsel for proponent has also assigned other errors. One is that the court erred in excluding from evidence the record of the will. We cannot see in what way the record of the will was competent as independent evidence. Any one who had compared the original with the record could, as a matter of course, have testified to the correctness of the copy, and the copy could then have been used as an examined copy of the original. Greenleaf, *Ev.* (16th Ed.) section 508. That is, any person who had made a copy of the original will, or who had compared the original with the prepared copy, which was shown to be a correct copy of the original, could have presented such copy as secondary evidence under the rule of examined copy. We know of no statute, however, and none is referred to, which makes the record of an unprobated will competent evidence. The court did not err, therefore, in refusing to admit the record of the will. The provisions of the will were, however, clearly established by other competent evidence.

We remark that, in view that the will of July 19, 1900, makes provision for the protestant, Hannah Jorgensen, her objections must likewise fail. Indeed, an objection of that character is not good as a ground of contest, but

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it is a matter that may be presented and considered when the court makes distribution of the estate as provided in Comp. Laws 1907, section 2762.

Nor are any of the other assignments of the proponent of the will material now.

In view, therefore, that the question involved here is one purely of law it is not necessary to prolong this litigation. The findings and conclusions of law, so far as the same are contrary to the views herein expressed, are set aside, and the cause is remanded to the district court, with directions to vacate and set aside the findings of fact and conclusions of law aforesaid. The court is also directed to modify its judgment in so far as thereby the will of July 19, 1900, was disallowed to be proved, and to make findings of fact and conclusions of law and to enter judgment admitting said will to probate, and to proceed with the administration of the estate in the usual way. Costs of the appeal to be paid out of the general assets of the estate.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

DEE v. SAN PEDRO, LOS ANGELES AND S. L. R. CO.

No. 3035. Decided August 6, 1917. (167 Pac. 246.)

1. **VENUE—ASSIGNMENT OF CAUSE OF ACTION—ASSIGNOR'S RESIDENCE.** Whenever a cause of action is assigned without consideration, the assignor continuing to be the real party in interest, the assignee is merely a trustee or collection agent, and the assignor, the real party in interest, is the person in whose favor the cause of action arose within Comp. Laws 1907, section 2931x1, providing that all transitory causes of action arising without the state in favor of residents shall be brought and tried in the county where such resident resides, in the county where the principal defendant resides, or, if the latter is a corporation, in the county where such resident resides, or in the county where such corporation has its principal place of business, etc. (Page 174.)
2. **VENUE—CHANGE—FICTITIOUS ASSIGNMENT.** An assignment of a cause of action, with or without consideration, made solely to confer jurisdiction on the court in which the action is commenced, thereby depriving defendant of a privilege afforded by the statutes relating

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to venue, will not prevail against a proper proceeding to change the place of trial. (Page 175.)

3. CORPORATIONS—VENUE—PERSONAL PRIVILEGE—WAIVER—STATUTE. Comp. Laws 1907, section 2931x1, conferred a mere personal privilege on a corporation sued on a cause of action arising without the state which could be waived by the corporation. (Page 175.)
4. CORPORATIONS—VENUE—PRIVILEGE—INVOCATION—STATUTE. It required a seasonable objection or motion in some form on the part of defendant corporation, sued on a cause of action arising without the state, to invoke its privilege, under Comp. Laws 1907, section 2931x1, to be sued in the county where it had its principal place of business, etc., and to bring it within the cognizance of the court. (Page 175.)
5. VENUE—APPLICATION FOR CHANGE. If the application for change of venue is based on the ground that the action is brought in the wrong county, it should negative any facts and circumstances under which such county would be the proper one. (Page 175.)
6. CORPORATIONS—VENUE—RIGHT TO CHANGE—WAIVER. Where defendant corporation moved for change of venue without negating the fact that plaintiff was a bona fide purchaser of the cause of action, in which case the action was commenced in the proper county, and thereafter it developed on cross-examination of a witness that plaintiff was not a bona fide purchaser, but defendant did not renew its motion, assigning specifically the newly discovered ground, defendant waived its privilege of change of the place of trial. (Page 176.)
7. APPEAL AND ERROR—HARMLESS ERROR. In an action for damage to a shipment of horses, error in overruling defendant railroad's motion for nonsuit on the ground that there was no proof of the terms and stipulations of the contract of transportation sued upon was rendered harmless by defendant's introducing the contract in evidence, thereby obtaining the full benefit of its terms.¹ (Page 178.)
8. APPEAL AND ERROR—HARMLESS ERROR—EVIDENCE. In an action against a railroad for damages to a shipment of horses, where the jury did not allow as damages for any one of the horses a sum greater than the value agreed upon between the parties in the written contract, the road was not prejudiced by the court's ruling permitting proof of value at destination instead of at shipping point, as provided in the contract. (Page 179.)
9. PLEADING—AMENDMENT OF COMPLAINT—EFFECT. In an action against a railroad for damages to a shipment of horses, where the original complaint declared for damages in the sum of \$665, and was afterwards amended to limit the territory within which damages were claimed to the states of Nevada and California, and a horse, which afterwards died, having been injured in Utah, was worth at

¹ *Boyd v. S. P., L. A. & S. L. R. Co.*, 45 Utah, 449, 146 Pac. 282.

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least \$150, verdict for \$580 was not excessive on the ground that the amendment removed the horse from the cause of action and reduced the ad damnum of the complaint to \$505. (Page 180.)

10. **CARRIERS—CARRIAGE OF STOCK—LIMITATION OF LIABILITY—EFFECT.** Where a contract for the transportation of horses limited claim for damages on account of any one animal to \$100, fixed as the declared value, and the shipper sold an injured mare for \$75, the shipper could recover \$80 damages on account of injuries to the mare, less than the declared value, and was not limited to a recovery of \$25.¹ (Page 181.)
11. **CARRIERS—CARRIAGE OF LIVE STOCK—LIABILITY FOR DAMAGE BY REASON OF DEPRIVATION OF FOOD AND WATER.** A railroad, not having provided facilities for feeding horses shipped while they were in its charge, and before delivery to the consignee, became liable for any damage sustained by the shipper by reason of the animals having been deprived of food for a period in excess of 36 hours, whether the horses were in the cars or in the stockyard awaiting delivery, the federal statute permitting the confinement of live stock without food and water by request of the shipper for thirty-six hours. (Page 184.)
12. **APPEAL AND ERROR—REVIEW—VERDICT.** The Supreme Court cannot disturb the verdict of a jury sustained by substantial evidence. (Page 185.)
13. **CARRIERS—CARRIAGE OF LIVE STOCK—DAMAGES—SUFFICIENCY OF EVIDENCE.** In an action against a railroad for injuries to a shipment of horses, evidence *held* to sustain an award of damages of \$20 per head from the horses having been deprived of food during more hours than was permissible under federal regulation. (Page 187.)
14. **APPEAL AND ERROR—PRESUMPTION—INSTRUCTIONS FOLLOWED.** Unless it can be shown that the jury considered other causes of damage than that submitted to it by the court, it must be presumed that it followed the court's instruction, and that the damages awarded were exclusively for the injuries limited by the instruction. (Page 188.)

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Action by Claude M. Dee against the San Pedro, Los Angeles and Salt Lake Railroad Company, a corporation.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Dana T. Smith for appellant.

C. C. Richards for respondent.

¹ *Baird v. D. & B. G. R. Co.*, 49 Utah, 58, 162 Pac. 79.

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APPELLANT'S POINTS

It is manifest that this assignment was merely for the purpose of endeavoring to give the Weber County Court jurisdiction. Such an assignment is not sufficient to give the court jurisdiction.

"Colorable, collusive or fictitious assignments of causes of action, made merely to evade the provisions of venal statutes, being a fraud upon the court, are void and will not operate to give the assignee the benefits accorded plaintiffs under the statutes." 40 Cys., p. 103; *Diffenderffer v. Rowden*, 83 Mo. App. 268; *Parsons v. Brown*, 50 New Hampshire 484; *Waldrep v. Roquemore*, 127 S. W. 248; *Taylor v. Sturgis*, 29 Tex. Civ. App. 270; 68 S. W. 538; *Jones v. Austin*, 6 Tex. Civ. App. 505; 26 S. W. 144. The rule laid down in the United States Courts, where citizenship of the parties is the jurisdictional ground, and where the principal is the same as it is in the case at bar, is that the court, in determining the question of jurisdiction, looks to the citizenship of the real parties in interest, not to that of merely nominal parties. *Huff v. Hutchinson*, 14 Howard, 586; 14 Law Edition, 553; *Browne v. Strode*, 5 Cr. 303; 3 Law Ed. 108; *McNutt v. Bland*, 2 Howard, 9; 11 Law Ed. 159; *Myuse of Markley v. Baldwin*, 112 U. S. 490; *Indiana ex rel. Stanton v. Glover*, 155 U. S. 513; *Williams v. Ritchie*, 3 Dill. 406; *Ruckman v. Palisade Land Co.*, 1 Fed. 367; *Woolrich v. McKenna*, 8 Fed. 650; *Wiggins v. Bethune*, 29 Fed. 51; *Voss v. Ninebar*, 68 Fed. 974; *Blumenthal v. Craig*, 81 Fed. 320.

RESPONDENT'S POINTS

A just and liberal construction of section 2931XI Compiled Laws of 1907, means that when a resident of the state has a cause of action which is transitory and arose out of the state he may sue either in the county where he resides or in the county where the principal defendant resides, or if such defendant is a corporation then where it has its principal place of business. The legislation was not intended to hinder or prevent assignments of causes of action for value and in good faith, in the due course of business, or to make them more

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onerous to collect by the assignees than they would be by the assignors. The intent was and is to allow any plaintiff to commence suit in his own county or in the defendant's county, whichever he prefers. Upon this point the case of *Stone v. Railroad Co.* reported in 32 Utah, 185-187, is directly in point.

If, however, the court should hold that our contention is unsound the defendant was not entitled to have a change of venue granted for neither the pleadings, the demand, nor the affidavit upon which the court acted disclosed that the plaintiff was not a resident of Weber County (wherein the suit was commenced) nor did they, or either of them, charge or intimate that the assignment of the cause of action had not been *bona fide* and for a valuable consideration, nor that the assignment had been made for the purpose of conferring jurisdiction upon the court to hear the cause. Under such a state of facts the trial court, and this court, will presume that the trial court had jurisdiction. 40 Cyc. 153, 154, 157, 160, 165; 4 Enc. P. & P. 431, 432, 434, 435, 437; *Granger's Union v. Ashe*, 12 Cal. App. 143, 106 Pac. 890; *Adamson v. Bergen*, 15 Colo. App. 396, 62 Pac. 630; *De Wein et al. v. Osborn*, 12 Colo. 407, 21 Pac. 190; *Chase et al. v. Railroad Co.*, 83 Cal. 468, 23 Pac. 533; *Pioneer S. & L. Co. v. Peck*, (Tex.) 49 S. W. 169.

THURMAN, J.

Appeal from a judgment of the district court of Weber County. The action is for damages caused by injuries to certain horses transported by appellant as a common carrier.

The complaint, in substance, alleges that one Sheffer delivered the horses, the property of Sheffer and Stewart, to defendant at Salt Lake City, to be transported to Stewart at Los Angeles under a written agreement executed by the parties for safe transport and delivery; that there were twenty-three horses, of the value of \$4,000; that Sheffer and Stewart agreed to pay for the transportation \$216; that the defendant did not safely deliver said animals according to agreement, but in a negligent and careless manner, so that while on board the train outside of Utah, and in the states of Nevada and California, and prior to their delivery, three of the horses were

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injured and thereafter died, and the remaining twenty head were deprived of food and water and became starved, shrunk, and emaciated, all to the damage of the owners in the sum of \$665; that the cause of action was thereafter assigned to the plaintiff.

The original complaint did not allege that the damages occurred outside of Utah, and the defendant appeared and demurred to the complaint, and at the same time filed an affidavit to the effect that defendant is a corporation with its principal place of business at Salt Lake City, Salt Lake County, Utah; also an affidavit of merits with demand in writing that the trial of the action be had in Salt Lake County, under the provisions of chapter 93, Sess. Laws Utah 1913. Thereafter the demurrer and application for a change of venue came on for hearing, and the plaintiff was permitted to amend his complaint so as to show that the cause of action arose outside of the state of Utah. The demurrer was overruled, and the motion for a change of venue denied.

Defendant filed an answer admitting that it received the horses under a written agreement to transport them to Los Angeles; that some of the horses were injured. For want of knowledge defendant denied the assignment to plaintiff, and, generally, denied the remaining allegations of the complaint. Further answering, defendant pleaded, in effect, the terms of the written agreement, the material parts of which will be referred to as the same become necessary in the course of this opinion. Defendant also alleged the court had no jurisdiction.

Plaintiff filed a reply admitting and denying certain allegations of new matter in the answer.

The case was tried to a jury, resulting in a verdict for plaintiff in the sum of \$712.02, including interest, for which sum judgment was entered.

Appellant has alleged numerous assignments of error. Such as have not been waived will be considered and disposed of in the order presented in appellant's brief.

The application for a change of venue was made under the provisions of chapter 93, Sess. Laws Utah 1913. The statute re-enacts sections 2932 and 2933 of the Revised Statutes of

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1898, which had been repealed by the Legislature in 1901 (Laws 1901, c. 23). The sections, as amended, provide in part:

"In all other cases (meaning cases not included in the preceding sections of Comp. Laws, 1907) the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action," etc.

The application, affidavit and demand for change of venue were regular and in due form. The proceeding was regular in every respect and sufficient, as the case then stood, to entitle defendant to have the action transferred to Salt Lake County. At this stage of the proceeding, however, the plaintiff obtained permission of the court to amend his complaint by alleging that the cause of action arose outside of Utah and in the states of Nevada and California. By this amendment the case was brought within the provisions of the next preceding section of Comp. Laws Utah 1907, viz. section 2931x1, which, in part, provides:

"All transitory causes of action arising without this state in favor of residents of this state shall, if suit is brought thereon in this state, be brought and tried in the county where such resident resides, or in the county where the principal defendant resides, or if the principal defendant is a corporation, then in the county where such resident resides or in the county where such corporation has its principal place of business, subject however, to a change of venue as provided by law," etc.

The amendment destroyed the effect of appellant's motion by materially changing the conditions which existed at the time the motion was made. The record does not disclose that the motion was renewed or a new one filed, but, as respondent in this brief admits that appellant renewed its motion after the complaint was amended, we will assume that such was the case. If it was renewed, however, it must have been in the same form as the one made before the complaint was amended. The sufficiency of the motion, under the changed conditions, is therefore drawn sharply in question.

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Appellant has assigned as error the overruling of the motion and earnestly contends that the motion should have been granted. Before proceeding to a determination of this question it is necessary to arrive at a rational and intelligent understanding of the real point in controversy between the parties. Appellant contends that, under the section of the statute last quoted, the cause of action arose in favor of Sheffer, one of the owners of the property, residing in Cache County, and that therefore either Cache County or Salt Lake County where appellant's principal place of business is located, was the county in which the action should have been commenced; that, even though the assignee might have had the right to sue, as plaintiff, still he should have sued in one or the other of the counties named. On the other hand as, we understand it, the respondent contends that the assignee is the person in whose favor the cause of action arose in the sense of the statute in question, and therefore the action was properly commenced in the county of his residence, to wit, Weber County. These contentions of the parties involve a construction of the statute in question, and for that reason the question assumes an importance outside of the present case. The court is of the opinion that both contentions are right under certain conditions and, under certain other conditions both are wrong.

We believe that both reason and authority on this subject support the view that, whenever a cause of action is assigned without consideration, the assignor remaining and continuing to be the real party in interest, the assignee is nothing more than a trustee or collection agent, and the assignor, 1 the real party in interest, is the person in whose favor the cause of action arose in the sense of the statute, and the county where he resides, or the county where the defendant resides, or, if a corporation, where it has its principal place of business, is the county in which the action should be commenced.

The court is further of the opinion that, if it should be made seasonably to appear that an assignment of a cause of action, either with or without consideration, is made for the

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sole purpose of conferring jurisdiction upon the court in which the action is commenced, thereby depriving defendant of a privilege afforded by the statutes relating to venue, such attempt should not be permitted to prevail against a proper proceeding to change the place of trial. 2

“Colorable, collusive, or fictitious assignments of causes of action made merely to evade the provisions of venue statutes being a fraud upon the court are void, and will not operate to give the assignee of the benefits accorded plaintiffs under the statute.” 40 Cyc. 103, and cases cited.

The foregoing excerpt from Cyc. is quoted in appellant’s brief, as are also the cases cited in the note. They are all in point.

The remainder of the paragraph from which the above is quoted reads as follows:

“The rule is otherwise, however, as to the venue of an action by a bona fide assignee for a valuable consideration who has been guilty of no fraud or collusion.”

See, also, *National Exchange Bank v. Foley et al.*, 27 Tex. Civ. App. 450, 66 S. W. 249; *Leahy v. Ortiz*, 38 Tex. Civ. App. 314, 85 S. W. 824.

The district court of Weber County, being a court of general jurisdiction, had jurisdiction of the subject-matter of this action. The statute under review fixing the venue conferred a mere personal privilege which could be waived by the privileged party. 40 Cyc. 110. It required a seasonable objection or motion in some form to invoke the privilege and bring it within the cognizance of the court. This was done in the case at bar, as before stated, prior to the complaint being amended, and at that time was in due form, because, as the case then stood, it was within the venue statute as amended by Laws Utah 1913, c. 93. But when the complaint was amended, and the cause of action was alleged to have arisen outside of the state, the case was then brought within the provisions of another and different section of the statute, and the question presented for consideration is: Was the motion of defendant sufficient as an application for change of venue in view of the altered situation caused by the amendment?

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"If the application is based on the ground that the action is brought in the wrong county, it should negative any facts and circumstances under which such county would be the proper one." 40 Cyc. 154.

See *Adamson v. Bergen*, 15 Colo. App. 396, 62 Pac. 629; *Granger's Union v. Ashe*, 12 Cal. App. 143, 106 Pac. 889; *Pearce v. Wallis*, 58 Tex. Civ. App. 315, 124 S. W. 496. Appellant's motion to change the place of trial nowhere negated certain conditions under which Weber County may have been the proper county. It did not negative the fact that plaintiff may have been a bona fide purchaser of the cause of action, in which case, as we have seen, the action was commenced in the proper county. It did not negative the fact that Sheffer was a resident of Weber County, which should have been done if appellant's construction of the statute was correct. It is true respondent for some reason supplied this omission by filing affidavits showing that Sheffer was not a resident of Weber County, and if we concede that this was sufficient on that point, still the omission to negative the fact that plaintiff was a bona fide purchaser was a fatal defect in the proceeding which justified the court in denying the motion.

During the trial of the case before the jury, however, it developed on cross-examination of Sheffer, a witness for the plaintiff, that plaintiff was not a bona fide purchaser of the cause of action; that he paid no consideration for it whatever; that he was a mere collection agent for 6 Sheffer and Stewart, the real parties in interest. Appellant insists that, inasmuch as this was the first knowledge appellant had of the fact, it should be permitted to avail itself of the information thus received even at that stage of the case in support of its motion to change the place of trial. Under the view we have already expressed, if this fact had been shown at the proper time and at the proper stage of the proceeding, the appellant would have been entitled to have the cause transferred to either Cache or Salt Lake County; but the serious question is: Can appellant avail itself of information obtained on the trial of a case on its merits where, as in this case, it did not renew its motion and assign specifically the newly discovered ground for the motion? No motion was offered, no showing was made, and no objection was inter-

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posed to further proceeding with the trial. It was not even suggested in the motion for a nonsuit which was made after plaintiff rested his case. Can a party on a question of this kind, which, as before stated, is only a question of personal privilege, after he obtains information upon which he might invoke that privilege, proceed with the trial upon the merits of the cause without jeopardizing the privilege itself? Can he thus avail himself of the chance of obtaining a favorable result on the merits of the case, and if he fail in that, then be heard to complain on the grounds that the trial was had in the wrong county? We think not. It is contrary to every rule of practice with which we are familiar. We do not wish to be understood as holding that, even if appellant had objected to proceeding with the trial under the circumstances mentioned, it could have effected a change of venue at that stage of the proceedings; but, had seasonable steps been taken as soon as practicable after appellant became informed of the fact, a different question would have been presented, which, however, we need not attempt to decide in this opinion.

As we understand the record, the trial court did not err in denying appellant's motion for a change of venue, and all the assignments based upon this alleged error must therefore fail.

The next matter complained of by appellant in the order of its argument is the omission of plaintiff to prove the written agreement referred to in plaintiff's complaint under which the horses were shipped to Los Angeles, and the failure of the court to compel plaintiff to make such proof. Appellant raises this question under its twelfth assignment of error, in which it is alleged that the court erred in overruling defendant's motion for a nonsuit, to which ruling defendant excepted.

The principal grounds alleged in support of defendant's motion for a nonsuit were that there was no proof of the terms and stipulations of the contract sued upon, the written contract alleged in the complaint not having been introduced in evidence, and no attempt to prove its terms and stipulations as secondary evidence.

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The motion for a nonsuit was overruled by the court apparently upon the grounds that, having admitted that there was a contract entered into for the transportation of the animals, the burden was on the defendant to prove any special terms of the contract that might limit its liability. 7 We need not discuss the reasons assigned by the court whether the same were valid or invalid, or whether the ruling amounted to a reversible error at the time it was made. Whatever might have been the effect of the order overruling the motion for a nonsuit was rendered entirely harmless and nonprejudicial by the defendant itself. It introduced the contract in evidence, and thereby obtained the full benefit of its terms. A party to an action may not retain the benefit of an exception to the exclusion of evidence after he has had the full benefit of the evidence itself. There is no difference between such a case and the contention of appellant on the point in question. This court has heretofore determined this identical question in a case in which appellant was a party defendant. *Boyd v. S. P., L. A. & S. L. R. R. Co.*, 45 Utah, 449, 146 Pac. 282. This assignment must also fail.

Appellant, under assignments 7, 8, 9, 10, and 11, excepted to the rulings of the court in permitting respondent, over appellant's objection, to prove the value of the animals shipped at Los Angeles. It was provided in the written agreement introduced by appellant that all claims for loss or damage to each of the animals shipped should be adjusted on the basis of value at the time and place of shipment, not exceeding the declared value which had been fixed at \$100 per head.

Appellant contends, and with much reason and force, that permitting respondent to prove the value of the animals at Los Angeles, the point to which they were shipped, instead of at Salt Lake City, the place from which they were shipped, was in contravention of the terms of the contract, and therefore error. We are of the opinion that this contention of appellant is well founded, and if the error is prejudicial, the assignments of error on this point should prevail. Was the error prejudicial? The evidence admitted over appellant's objection could by no possibility affect the value of more than

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three of the horses in question: (1) A horse described as a bay gelding, injured in Utah; (2) another horse, which died from injuries received; (3) still another injured, which plaintiff sold for \$75. The horses were of the actual value of \$175 per head.

The court, by instruction, excluded from the jury all consideration as to the horse injured in Utah, because it was outside the claim made by plaintiff. As to the second, which died, the jury allowed the sum of \$100, the declared value under the contract. For the third animal the jury 8 allowed the plaintiff \$80, which was less than the declared value, and, besides this, the plaintiff had sold the animal for \$75. Thus it appears the jury did not allow for any one of said horses a sum greater than the value agreed upon between plaintiff and defendant in the written contract. How then was appellant prejudiced by the ruling of the court permitting proof of value at Los Angeles instead of at Salt Lake City, as provided in the shipping contract? There was no direct proof at all as to the value in Salt Lake City, the place where the value ought to have been established, but there was indirect proof of a very satisfying character. It was shown that the horses were purchased at Pocatello, Idaho, for the sum of \$125 each; thence shipped via Salt Lake City to Los Angeles to a higher market. They were rebilled at Salt Lake City. The presumption is almost conclusive that the horses were worth more in Salt Lake City than in Pocatello, because they were nearer the better market. In addition to this, as stated by respondent, appellant requested the court to instruct the jury as to the animal that died that it could not find a verdict for more than \$100, thus recognizing the right of the jury to find to that extent, notwithstanding the absence of direct proof of the value at Salt Lake City. The court so instructed the jury, and the jury followed the instruction. We are inclined to hold, if the court erred at all in admitting the evidence in-question, it was error without prejudice, and therefore all the assignments of error based upon this ruling of the court are without merit.

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In connection with the horse injured in Utah, appellant complains that the damages awarded by the jury are excessive. It raises this question on its motion for a new trial, which was overruled. Appellant's contentions are that plaintiff alleged his entire damage in the complaint at \$665; that this sum included the value of the horse injured in Utah, which afterwards died; that this horse, under the complaint, as amended, was entirely outside the case, and consideration thereof was taken from the jury by instruction of the court; that the testimony showed that the value of this horse was from \$150 to \$180, and the court should have instructed the jury to deduct the value of the horse from the total amount demanded in the complaint, but, instead of so doing, the court instructed the jury that if it found for the plaintiff it could allow the total amount, not exceeding \$665, the amount demanded in the complaint. It is then contended by appellant that if the jury had deducted the lowest value, \$150, it could not have found a verdict for more than \$505, whereas the jury found \$580, exclusive of interest, which made the verdict excessive to the extent of \$75. It required an ingenious process of reasoning to reach this result, and we confess our inability to see the logic of the contention. As before stated, the original complaint declared for damages in the sum of \$665, and was afterwards amended, not by changing the sum prayed for, but by limiting the territory within which damages were claimed, to wit, within the states of Nevada and California. Now, if the damages awarded by the jury were for injury done only in the states of Nevada and California, and were within the amount prayed for in the amended complaint, and within the evidence, we are unable to see what grounds appellant has to complain of excessive damages on this account. Plaintiff could have amended his complaint by increasing the amount of damages prayed for, if he had desired, and the only effect of the amendment he did make on the matter of damages was to eliminate all damages in the state of Utah and transfer the entire amount claimed to injuries occurring in Nevada and California. Besides this, we cannot understand what the injury done to the horse in

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Utah, or the value of that horse, had to do with the case after the plaintiff amended his complaint, and especially after the court, by positive instruction, took that matter from the jury. As shown by the verdict, the jury followed the instructions of the court. Neither the court nor the jury erred in respect to this charge of excessive damages.

Appellant charges as error the refusal of the court to instruct the jury as requested in the latter part of its request No. 12, which in part reads as follows:

“And if you find from the evidence that the mare which was afterwards sold for the sum of \$75 was injured in either the state of Nevada or the state of California as the result of the negligence of the defendant, you can only allow the plaintiff the sum of \$25 for the damages to her.”

The court refused that portion of the request on account of its limitation as to the amount of damages that might be recovered.

As before stated, the contract between the parties limited the claim respondent might make for damages on account of any one animal to a sum not exceeding \$100, which had been fixed as the declared value. The mare referred to in that portion of the request we have quoted was injured 10 while in transit, and afterwards sold by plaintiff for \$75. Appellant's request was based upon the assumption that, as the declared value was only \$100, and the plaintiff sold the mare for \$75, the jury should not be permitted to award the plaintiff a sum exceeding \$25. The court refused to instruct as requested, and the jury awarded plaintiff \$80 damages on account of injury to the mare. The amount allowed being less than \$100, the declared value fixed by the parties, the ruling of the court affords no grounds for complaint on the part of appellant. The sum of \$100 per head was fixed as the greatest amount plaintiff could recover from the defendant, either for injury or total loss, and it had no relation whatever to what plaintiff might realize for the animal from other sources. This question has been determined by this court in a recent case adversely to appellant's contention. *Baird v. D. & R. G. R. Co.*, 49 Utah, 58, 162 Pac. 79. We

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see no reason for departing from the rule announced in that case.

In the written contract under which the animals were shipped respondent agreed "to load said live stock at point of shipment, unload and reload at resting places, and unload at destination and to feed and water at his expense, and to accompany and attend said live stock en route and to destination." It was known by the evidence that the horses were not fed promptly upon being unloaded at Los Angeles. The federal statute in such cases permits the confinement of the animals without food and water for a period of twenty-eight hours. By request of the shipper this period may be extended to thirty-six hours. The request was made in the present case. The horses arrived at Los Angeles at eleven P. M., having then been confined without food and water for a period of thirty-three hours, which, as we have shown, was permissible under the federal statute and the request of the shipper above referred to. The horses were then taken to the stockyard and unloaded at about one A. M. next morning. No food had been provided, nor could any be obtained by the shipper before seven o'clock A. M. The shipper could not procure a delivery of the horses to him until the freight was paid, and he could not pay the freight until the office opened in the morning. The testimony tends to show the horses were not fed until about seven or eight o'clock A. M. after a confinement without food for over thirty-nine hours. Appellant contends, under the provision of the shipping contract above quoted, that it was not responsible for any damages to the animals after they were unloaded at Los Angeles; that its duty as a carrier ceased at that point; that it owed no duty to furnish food at the stockyards in Los Angeles, and that the shipper had agreed to feed the horses himself. Evidence of what occurred in Los Angeles after the horses were unloaded was objected to by appellant and assigned as error; also an instruction of the court authorizing the recovery of damages for failure to provide food and the refusal of appellant's request to instruct that the defendant was not liable after the horses were unloaded are likewise assigned as error. The

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jury found as damages for the plaintiff for each of the twenty head of horses the sum of \$20, and under the complaint this damage is limited to injury done by being deprived of food and water for the period in excess of thirty-six hours.

The contention of appellant on this point is that it is not liable for damages on this account, inasmuch as the shipper had agreed to feed and water the animals, and, furthermore, that it is not liable for any damages after the horses were unloaded. In support of these propositions appellant cites *Mo. Pac. v. Texas* (C. C.) 41 Fed. 913; *Ga. Ry. & B. Co. v. Reid*, 91 Ga., 377, 17 S. E. 934; *Central R. v. Bryant*, 73 Ga. 722; *U. S. v. Philadelphia R. R. Co.* (D. C.) 223 Fed. 207-211; *Paul v. Pennsylvania Ry. Co.*, 70 N. J. Law, 442, 57 Atl. 139; *Ft. Worth & Denver City R. R. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525; *Hengstler v. Flint & P. M. R. R.*, 125 Mich. 530, 84 N. W. 1067. These cases are nearly all in point upon the proposition that a special contract whereby the shipper assumes the duty of feeding and watering live stock en route is a valid stipulation, not against public policy, and binding on the shipper. Some of them are federal cases in which the provisions are construed liberally in favor of the shipper, and most of them are cases in which the failure to provide food and water was due to the fault or negligence of the shipper himself. None of the cases are in point in a case like the one at bar where the carrier failed to provide facilities whereby the shipper could obtain food and water. In the *Ft. Worth & Denver City R. R. Case*, cited by appellant, the doctrine which we believe should be applied to this case is enunciated in a paragraph of the opinion, which we quote in full:

"We are further of the opinion that the special contract, as well as the act of Congress, relieved the carrier of the duty in the first instance, of feeding and watering at such points as it furnished reasonable facilities to the shipper to do so, but that in the absence of such facilities at any point the contract would be unreasonable as to such point, and the carrier would be liable for any damage resulting from the failure to feed and water at such point."

It does seem to us that, until the animals in question could be turned over and delivered to the consignee in the due course of business, the duties of the carrier, whatever they might be,

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were continuing and did not cease as claimed by appellant when they were turned into the stockyard. To the same effect as the language which we have quoted from the Texas case are many of the cases cited by respondent. In *Groot v. Railroad Co.*, 34 Utah, 161, 96 Pac. 1019, this court announces the same doctrine, and, although it was an action for a tort, the principle is thoroughly discussed and considered. In *Railroad Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349, the court says:

“Where a duty is imposed by law on a railroad company to water and feed stock in transit, it is not relieved from liability by showing that the shipper had undertaken that duty, if it appears that by its acts it prevented the shipper from performing it.”

Railway Co. v. Crawford (Tex. Civ. App.) 146 S. W. 329, is to the same effect. *Railway Co. v. Cunningham*, 51 Tex. Civ. App. 368, 113 S. W. 767, holds that a stipulation by the shipper whereby he assumes the duty of feeding and watering live stock in transit is void where the carrier does not provide reasonable facilities for that purpose. The Texas Court of Civil Appeals in *Chicago, R. I. & G. R. Co. v. Scott*, 156 S. W. 297, holds that a provision in the shipping contract whereby the shipper assumes the risk and expense of feeding, watering, and otherwise caring for live stock while in cars, yards, and pens, etc., is void. Respondent cites also *Burns v. Chicago, Milwaukee & St. Paul R. Co.*, 104 Wis. 646, 80 N. W. 927, *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883, *Smith et al. v. Railway Co.*, 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440, *Grieve v. Ill. Cent. Ry. Co.*, 104 Iowa, 659, 74 N. W. 192, *Railway Co. v. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449, *Ward v. Railway Co.*, 87 Kan. 824, 126 Pac. 1083, and many other cases, all of which are more or less in point on the question now under review.

As we view this question under the evidence, appellants, not having provided facilities for feeding the 11 horses during the time they were in its charge, and before delivery to the consignee, became liable for any damage sustained by the shipper by reason of the animals being deprived of food for a period of time in excess of thirty-six hours, whether the horses were in its cars or in the stock-

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yard awaiting delivery. Appellant's assignments of error on this account should not prevail.

The only remaining question to be determined is as to the damages awarded by the jury for the twenty head of horses which, the complaint alleges, were starved, emaciated, and shrunken in flesh by being deprived of food and water for more than thirty-nine hours at one time, while in transit and prior to their delivery at Los Angeles. As to these horses the complaint did not allege injury from bruises, wounds, lacerations, etc., as it did concerning the other three horses already considered by the court. But, inasmuch as the evidence introduced tended to show that the horses were bruised and scarred, as well as shrunken and emaciated, appellant contends that the jury which awarded plaintiff \$20 per head as damages could not, under the circumstances, ascertain the damages, and in any event that the damages are excessive. The impracticability, if not the impossibility, of segregating the damages caused by lack of food and water from the damages caused by being bruised, wounded, and scarred is relied on by appellant in support of its contention. It is claimed by appellant that the jury disregarded the instruction of the court limiting it to damages on account of the horses being deprived of food, and, without attempting to segregate the damages, awarded the plaintiff damages for all the injuries the horses sustained, including bruises, wounds, scars, etc. For this reason appellant insists that the damages are excessive.

This assignment of error involves the question as to whether or not the evidence is sufficient to support the verdict as to that item of damages. Upon that question this 12 court must give heed to a well-established rule by which it cannot disturb the verdict of a jury if it is sustained by substantial evidence. It cannot examine the evidence with the view of determining what, in its judgment, the verdict should have been. Its only function is to determine whether or not the verdict is sustained by any substantial evidence. It therefore becomes necessary to review the evidence for that purpose before considering the law relating to a question of

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this kind. Mr. Sheffer, one of the owners of the horses, and a witness for plaintiff, on direct examination, after stating that the horses were gaunt, shrunken, bruised, and scarred, was asked the question:

“You may state how their condition compared with what it should have been if they had been fed five or six hours earlier.”

He answered:

“Well, they wouldn’t have been so gaunt and drawn if they had been fed earlier.”

He then stated that that would have made a difference in their market value. He was then asked what difference, in his opinion, it would have made in the market value per head. He answered:

“Well, they will run anywhere from \$15 to \$25 per head.”

On cross-examination the witness’ answer, as we read the record, is a little confusing, but in answer to questions asked by appellant which included injuries from all sources, rough handling, deprivation of food, etc., the witness placed the damage at about the same figure as he did on direct examination, that is, \$15 or \$25 per head. Mr. Stewart, another witness for plaintiff, testified the market value of the horses in Los Angeles uninjured would have been \$175. In the condition they were in when they came off the cars, in his opinion, their value would not be more than \$140 per head. Mr. Richert, another witness for plaintiff, thought the normal value of the horses would have been from \$175 to \$200 per head, but they were shrunken, skinned up, etc., and in that condition he placed the value at \$75 per head. Mr. Dowers said the horses looked awfully gaunt. They were badly shrunken and awfully skinned up. The average value of such horses should be \$170 to \$180 per head. In the condition they were in he placed the value at \$140 per head. Dr. Hubbell, another witness, testified that the horses were badly shrunken; more than the usual shrinkage of horses. This was due to want of food, water, and rest.

The foregoing presents the principal and most substantial features of the evidence on the point in question. From this it

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will be seen that the witness Sheffer in the first instance estimated the damage at \$15 to \$25, due to the lack of feed during the last few hours while the horses were in charge of appellant. On cross-examination by appellant there was brought into the case injury from rough handling as a basis for a part of that damage. Another witness put the entire damage from all causes at \$100 per head, and two other witnesses placed the damages at \$35 per head. The witness Dr. Hubbell says they were badly shrunk, much more than usual, and this was for lack of food, water, and rest.

This much is manifest, the award of \$20 per head by the jury was clearly within the evidence and away below the average of all the evidence by the witnesses as to the entire damage from all causes. It is therefore not clear by any means, as claimed by appellant, that the jury allowed the plaintiff "damages for the whole amount of injury sustained by the horses arising from all causes." If the jury had intended so to do, it could have allowed \$100 per head, or \$35 per head, if the pleadings had permitted it, and still have been supported by substantial evidence. It does not follow because we cannot, in a case of this kind, determine just what the process of reasoning was by which the jury arrived at its verdict, that therefore the verdict should be set aside. If we were governed by that kind of rule, very few verdicts would be permitted to stand, except where the evidence could be reduced to a mathematical certainty. That cannot be done in a case of this kind. As stated in 8 R. C. L. p. 441:

"It is evident that the damages recoverable are nearly always involved in some uncertainty and contingency, and therefore it is a rule that reasonable certainty only is required. Formerly the tendency was to restrict the recovery to such matters as were susceptible of having attached to them a pecuniary value, but it is now generally held that the uncertainty referred to is uncertainty as to the fact of damage, and not as to its amount, and that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. This is particularly true where, from the nature of the case, the extent of the injury and the amount of the damage are not capable of exact and accurate proof."

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In the note, 53 L. R. A. at page 40, it is said:

"The rule that speculative damages cannot be recovered applies where it is uncertain whether damages were sustained at all from the breach or not, and not to such as are merely uncertain in amount."

In *Blagen v. Thompson*, 23 Or. 239, 31 Pac. 647, 18 L. R. A. at page 320, the court says:

"The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all."

In *City of Elgin v. Welch*, 16 Ill. App., a case cited by appellant, the court, at page 488, says:

"If from the nature of the case the jury could not ascertain with certainty the amount of the plaintiff's damages from the water set back by the concrete sidewalk, in contradistinction from that done by drainage in its natural course from other quarters or by percolation from the ditches of water other than that so set back, it was their province to estimate as best they could from the evidence how much of the whole amount was occasioned by it."

The point in question is not, How did the jury arrive at its conclusion? but, Is its conclusion and verdict within the evidence? As conceded by appellant, the court, by its instruction No. 3, limited the damage to the twenty head of horses solely to their being deprived of food during the last few hours, and did not submit to it in any form the right to award damages on any other account.

Unless it can be shown that the jury considered other causes of damage than that submitted to it by the court, it must be presumed that it followed the court's instruction, 14 and that the damages awarded were exclusively for the injuries limited by the instruction.

We think the damages awarded for injury to the twenty head of horses were clearly within the evidence, and this court, in such a case, has no power to disturb the findings of the jury.

We find no error in the record. It is therefore ordered that the judgment of the trial court be affirmed; appellant to pay costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

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STATE ex rel. SHIELDS v. BARKER

No. 3106. Decided August 8, 1917. (167 Pac. 262.)

1. **STATUTES—SURPLUSAGE—DISREGARD.** The preposition “in,” in Laws 1917, c. 107, providing “that in all cities of the state having a population of more than 7,500 and less than 50,000 inhabitants may create by ordinance a court,” is mere surplusage, and will be disregarded. (Page 191.)
2. **CONSTITUTIONAL LAW—COURTS—LEGISLATIVE POWER—DELEGATION OF POWER TO CREATE COURTS.** Laws 1917, c. 107, providing “that in all cities of the state having a population of more than 7,500 and less than 50,000 inhabitants may create by ordinance a court to be called,” etc., is in violation of Const. art. 8, section 1, providing that “the judicial power of the state shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law,” in that it delegates the power to create the municipal courts mentioned to the city authorities. (Page 191.)
3. **CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY—DUAL MEANING.** In case a change in any act admits of a dual meaning, that meaning must be adopted which upholds the act. (Page 193.)
4. **CONSTITUTIONAL LAW—PRESUMPTION OF CONSTITUTIONALITY.** Courts cannot declare an act invalid unless it clearly, palpably, and beyond a reasonable doubt contravenes some constitutional provisions. (Page 193.)
5. **STATUTES—INVALIDITY IN PART.** Where different sections of the Compiled Laws have been amended so as to make the amendatory act conform to the new condition contemplated, and the amendment is invalid as to one section, it must also be held invalid as to all. (Page 195.)
6. **STATUTES—REPEAL—UNCONSTITUTIONAL STATUTE—EFFECT.** Where an amendatory act repeals a former law upon the same subject and the amendatory act is held invalid on constitutional grounds, the amendatory act is impotent to repeal the whole law. (Page 195.)

Original quo warranto proceedings by the State on the relation of Dan B. Shields, against George S. Barker.

Petition discharged without costs.

Stuart P. Dobbs and *A. G. Horn* for plaintiff.

E. T. Hulaniski and *John G. Willis* for defendant.

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FRICK, C. J.

Hon. Dan B. Shields, as Attorney General of this state, obtained leave of this court to bring this action in quo warranto as an original proceeding. The action is instituted against the defendant George S. Barker as judge of the municipal court of Ogden City to determine his right to discharge the duties as such judge and to test the validity of chapter 107, Laws Utah 1917, p. 377.

The defendant is the duly elected judge of the municipal court of Ogden City, under the provisions of Comp. Laws 1907, section 686x37. The Legislature, at the 1917 session, however, amended section 686x37, *supra*, together with other sections which we shall refer to later in this opinion. It is contended on the part of the defendant that the amendatory act of 1917 is unconstitutional and void, and that he is lawfully acting under the old law. Upon the other hand, it is insisted that if said act is not void, then the old law under which the defendant was elected and is acting has been repealed, and hence he is unlawfully holding and exercising the functions of a public office.

The defendant entered a voluntary appearance, and, while admitting all the allegations of the complaint, he, nevertheless, insists that chapter 107, Laws Utah 1917, is unconstitutional and void, and for that reason the old law is still in full force and effect. The part of section 686x37 as originally enacted, and which is material here reads as follows:

"In all cities of this state having a population of more than 15,000 and less than 40,000 inhabitants, there is hereby created a court to be called 'the Municipal Court for _____ City, Utah,' " (Italics ours.)

The section then prescribes the qualifications of the judge, when and how elected, and the term of office, etc. That section was amended by chapter 107 aforesaid to read as follows:

"That in all cities of the state having a population of more than seventy-five hundred and less than fifty thousand inhabitants may create by ordinance a court to be called 'the Municipal Court for _____ City, Utah.' " (Italics ours.)

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It must be apparent to all that the preposition "in" in the foregoing quotation is mere surplusage, and it therefore will receive no further consideration. 1

The same provisions that are contained in the original section are then re-enacted in the amendatory act, except that the first election under the new act is to be held in November, 1917. Our Constitution, article 8, section 1, reads as follows:

"The judicial power of the state shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

The principal questions that arise in this controversy are: Does the amendatory act delegate the power to create the municipal courts mentioned therein to the city authorities of the cities enumerated in the act; and, if so, may that power be delegated by the Legislature? When those two propositions are solved, all the other questions are merely incidental. 2

What is meant by the expression "as may be established by law" in the constitutional provision we have quoted? To our minds the expression admits of but one meaning, and that is, if, in the judgment of the Legislature, it becomes necessary to establish courts in addition to those enumerated in the constitutional provision, then the Legislature may, by law duly passed, create such other courts inferior to the Supreme Court as in the judgment of that body may be necessary. To be "established by law" means just what it says, namely, by a law duly passed by the lawmaking power of this state. The Supreme Court of Michigan in *Fennell v. Common Council*, etc. 36 Mich., in referring to what is meant in the Michigan Constitution by the term "law," at page 190, says:

"We have heretofore on more than one occasion intimated that the penal laws referred to in the state Constitution were the laws of the state. The term 'law,' as defined by the elementary writers, emanates from the sovereignty and not from its creatures. The legislative power of the state is vested in the state Legislature, and their enactments are the only instruments that can in any proper sense be called laws,"

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The question in that case was whether certain ordinances ought to be considered laws within the purview of the Constitution. The intention of the framers of the constitutional provision we have quoted from our Constitution, in using the term "law," is, however, much clearer and stronger than was the case in the decision just quoted from. Here the framers of the Constitution, who represented the sovereign people, were conferring an express power to create courts, which is the exclusive prerogative of the sovereign. Upon whom, therefore, did they confer the power to create such courts? Manifestly, upon those who were chosen by and who represent the people, namely, the members of the Legislature when duly assembled to enact laws. How were such courts to be created? Most clearly by the only method known to legislative bodies, namely, by the passage of a law in due and proper form. "Inferior courts," therefore, if created at all, must be created by the Legislature by the adoption of a law to that effect.

We need not pause to point out that the powers delegated to the Legislature may not be redelegated by that body, and that in no event may a law be passed except by the Legislature, unless the Constitution provides to the contrary. In this instance the Constitution requires the regular method.

While counsel on both sides have frankly conceded that the amendatory act is probably unconstitutional, yet in view that courts are very reluctant to declare laws unconstitutional, they have suggested that the amendatory act may perhaps be construed so that the courts mentioned in the act are in fact established by a law passed by the Legislature, and that the act merely authorizes the city authorities to adopt the act or to refuse to do so, as they may elect. Several cases are cited in which, under the peculiar wording of the acts there in question, such acts were so construed. Such was the case in *State ex. rel Hagestad v. Sullivan*, 67 Minn. 379, 69 N. W. 1094; *Lytle v. May*, 49 Iowa, 224, and in *Page v. Millerton*, 114 Iowa, 378, 86 N. W. 440. We could subserve no good purpose in pausing here to set forth the acts that were passed on in those cases. It is sufficient to call attention to the fact that we have a case here where the change of language between the

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original and amendatory acts is radical and irreconcilable. The change is not one where there merely is a change of expression while the original sense is retained. If the Legislature had intended to create the courts in the new act, there would have been no necessity whatever of changing the language, in that regard, of the original act. That change aptly and clearly expressed the legislative intention. The only purpose of changing the language, therefore, was to bring about a change in the agency creating the courts. Instead of the Legislature creating the courts, as was done in the original act, that power was conferred on the cities in the amendatory act.

We are not unmindful of the fact that it is our duty to construe and apply all legislative acts so as to 3 make them harmonious with the Constitution, if such a thing is possible, and in case a change in any act admits of a dual meaning, we must adopt that meaning which upholds the act.

Nor are we permitted to declare an act invalid unless it is clearly, palpably, and beyond a reasonable doubt in contravention of some constitutional provision. To that 4 effect are all of the cases decided by this court. The last expression upon the subject is found in the case of *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, 167 Pac. 241, decided at this term. In order to hold the amendatory act creating the courts therein mentioned valid, we would not only have to ignore and go counter to every known rule or canon of construction, but we would also be required to disregard the manifest intention of the Legislature as expressed in the amendatory act. Let us pause a moment to examine the controlling words of the amendatory act. They are:

"That all cities of the state having a population of more than seventy-five hundred and less than fifty thousand inhabitants may create by ordinance a court," etc.

The controlling words of the original act before it was amended were:

"In all cities of this state having a population of more than 15,000 and less than 40,000 inhabitants there is hereby created a court," etc.

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In amending the original act the Legislature therefore intended to accomplish two purposes: (1) To enlarge the class and thereby increase the number of cities in which municipal courts should be established; and (2) instead of creating such courts by legislative edict to authorize their creation by the several cities coming within the class named in the act. No reasonable person would contend that under any rule of construction it would be permissible to construe the act to the effect that the Legislature did not intend to change the number of inhabitants and thereby to enlarge the class and to increase the number of cities to which the amendatory act would apply as compared with what was the effect in those respects in the original act. It would, however, be just as reasonable to hold that as it would be to hold that the Legislature intended to create the courts rather than to delegate the power to the several cities. That the Legislature intended to accomplish the latter purpose is just as clear from the language used as it is that it intended to accomplish the former. It would be quite as reasonable to hold that the Legislature did not intend to enlarge the class of cities to which the amendatory act should apply as it would be to hold that it did not intend that the cities should create the courts mentioned in the act. To hold either would do violence to all the language that is used in that portion of the act we have quoted above. It is too clear for controversy, therefore, that in passing the amendatory act the Legislature attempted to delegate a power which, by the Constitution, is expressly conferred on that body; and in doing that the Legislature transcended the constitutional provision we have quoted.

It is not necessary to pursue the subject farther, except to say that in this case the whole court is not only satisfied beyond a reasonable doubt, but all of us are satisfied beyond all possible doubt, that in passing the amendatory act the Legislature intended to accomplish what the Constitution does not permit, and for that reason the act is unconstitutional, and therefore void and of no effect.

As before indicated, the Legislature in the same act also amended Comp. Laws 1907, section 686x43, 686x45, and

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686x46, all of which were parts of the original act. The question, therefore, arises, Are those amendments 5 so connected with the amendatory act which we have just held invalid that they, too, must fall as part of the act? We think it needs no argument to show that the latter amendments were adopted to make the amendatory act as a whole conform to the new conditions contemplated by the amendment of section 686x37, and for that reason the latter three sections as amended must also be held bad.

The amendatory act, however, also repeals "all acts and parts of acts in conflict herewith," and hence it is mooted whether the old law as it existed before the amendatory act was passed is not repealed. In *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1019, we directly held that where an amendatory act repeals a former law upon the same 6 subject and the amendatory act is held invalid on constitutional grounds, the amendatory act is impotent to repeal the old law, and that the old law remains in full force and effect as though the amendatory act had not been passed. The law with respect to the municipal court in Ogden City is therefore in force precisely as it was before the amendatory act was passed.

In conclusion we desire to add that we would have saved the act in question had it been possible for us to do so without transcending the Constitution, since we are of the opinion that the cities included within the amendatory act are entitled to municipal courts. The Legislature should, however, create the courts and define their powers and jurisdiction, and not attempt to confer the power to create them on some other agency. The Legislature may easily provide courts for all the cities included in the amendatory act by merely passing an act by which the class of cities in which such courts are created is enlarged as in the amendatory act.

From what has been said it follows that the defendant is not unlawfully exercising the functions of the municipal judge of Ogden City, but that he, in all respects, is discharging the duties imposed on him as such judge according to law. It is

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therefore ordered that the petition of the Attorney General be, and the same is hereby, dismissed, without costs.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

TRACY LOAN & TRUST CO. v. MERCHANTS' BANK et al.

No. 2923. Decided August 8, 1917. (167 Pac. 353.)

1. **BANKS AND BANKING—STATE BANKS—POWERS—GUARANTY.** Defendant bank's articles of incorporation provided that the bank was organized for the purpose of pursuing the banking business in all its branches, and should have power to deal in all commercial papers, etc., lease or purchase land and buildings proper for its use in conducting its business, and might acquire in the due course of business property of all kinds, etc. Const. art. 12, sec. 10 provides that "No corporation shall engage in any business other than that expressly authorized by its charter or articles of incorporation." Held, that a writing executed by the president of the bank guaranteeing the payment of rent by a drug company to plaintiff was ultra vires.¹ (Page 200.)
2. **BANKS AND BANKING—STATE BANKS—IMPLIED POWERS.** When it has been determined that the acts attempted to be done are not within its charter or statutory powers, no implied powers can validate its acts. (Page 202.)
3. **BANKS AND BANKING—STATE BANKS—DELEGATION OF AUTHORITY.** Since the bank itself could not execute the contract of guaranty, it could not delegate such authority to its president. (Page 202.)
4. **BANKS AND BANKING—ULTRA VIRES CONTRACT—ESTOPPEL.** In an action on a guaranty executed by the president of defendant state bank, held under evidence that there had been no such conduct on the part of the bank or its officers as to estop the bank setting up that the guaranty was ultra vires. (Page 203.)
5. **BANKS AND BANKING—ULTRA VIRES CONTRACT—SECURITIES.** Although the bank was not liable on the ultra vires contract of guaranty, it should be required to account for any securities which it holds to indemnify it against loss. (Page 205.)

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Action by the Tracy Loan & Trust Company against the Merchants' Bank and another.

¹ *Seeley v. Canal Co.*, 27 Utah, 179, 75 Pac. 367, and *Christensen v. Realty Co.*, 42 Utah, 86, 129 Pac. 412.

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Judgment for plaintiff. Defendant named appeals.

REVERSED with directions.

Edwards & Wasson and *Soule & Spaulding* for appellant.

Stephens & Smith and *Jas. Ingebretsen* for respondent.

GIDEON, J.

In this action plaintiff seeks to recover a judgment against the defendants, Merchants' Bank and H. P. Clark. As a basis for the cause of action the complaint alleges the corporate existence of the plaintiff and the defendant Merchants' Bank, organized and doing business under the laws of the state of Utah, and that the Treasurer-Nelden-Ferron Drug Company, was, on the 23d day of September, 1910, a corporation existing under the laws of this state. The complaint further alleges that the plaintiff was, at that date, and thereafter for a term of years, the owner under lease of certain premises located in Salt Lake City, commonly known as 172 South Main street; that the plaintiff acquired its interest in said premises and sublet the same to the said Treasurer-Nelden-Ferron Drug Company under a written lease dated the 23d day of September, 1910, wherein the premises were let to the said drug company from the 1st day of February, 1911, until the 1st day of February, 1916, for the sum of \$36,000, payable monthly in installments of \$600 each in advance; that on the 23d day of September, 1910, the defendants, Merchants' Bank and H. P. Clark, in consideration of the leasing of the premises by the plaintiff to the drug company, agreed to pay and guaranteed the payment of said rent and the whole thereof, and of the obligations assumed by the drug company. It is further stated in the complaint that the drug company paid the stated rent on the premises for the months of February, March, April, May, and June, 1911, or a total of \$3,000, and that it thereafter failed to make any payments of rent, as in said lease provided, and that the premises were sublet, but that the rental received did not equal the rental provided for in the lease executed to the drug company, and the complaint

asks judgment for the difference between the amount received from reletting the premises and the monthly rental as provided for in the lease. Both the lease and the alleged guaranty on the part of the defendants, Merchants' Bank and H. P. Clark, are attached to the complaint as exhibits and made parts of the same.

The defendant Clark filed an answer to the complaint, but as the action was afterwards dismissed as to him, no consideration will be given the issues made by his answer.

The defendant bank, in its answer, admits the corporate existence of both the plaintiff company and the bank; denies practically all of the other allegations of the complaint, and alleges, as a further defense, that the defendant bank is a corporation organized under the laws of Utah for the purpose of carrying on and conducting a banking business; and the objects of the corporation, as stated in its articles of incorporation, are set out in full in the answer. The bank in its answer also alleges, in addition to the original provisions of the articles, an amendment made to said articles on the 20th day of November, 1909, wherein said articles were amended to provide for a board of directors of fifteen members, and that said board should have general control and supervision of the property, business, and affairs of the corporation and prescribe by-laws, rules, and regulations for the conduct of its business; that on the 24th day of November of said year the directors adopted by-laws, and a copy of the same is attached to the answer and made a part thereof. The answer alleges as an affirmative defense that the execution of the written guaranty was, under the provisions of the articles of incorporation, ultra vires the bank, and that the signing and delivery of the instrument by Clark, as president of the bank or otherwise, in respect to said corporation, was ultra vires to bind the defendant bank. The answer further alleges that the defendant bank was in no way interested in the premises sought to be leased by the drug company, and received no consideration for the execution or delivery of the purported contract of guaranty, and the same never has been, was not, and is not, binding upon the bank and is void and of no force or effect as against the

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bank; that the bank never recognized said instrument as a contract binding upon it, but, on the contrary, has at all times repudiated and disclaimed any liability under the same, and immediately upon receiving notice of the existence of the instrument and the delivery thereof the same was declared to be without authority on the part of said Clark, and his action was repudiated.

Plaintiff, in its reply, denies many of the allegations of the answer, pleads as a defense to the claims of the defendant bank that during the time Clark was president of the bank and on the 23d day of September, 1910, and thereafter till the year 1913, with the consent and acquiescence of the stockholders, directors, and all other officers of the bank, he was in absolute and direct control of its affairs and business and conducted and promoted and developed the same at his own discretion; that the officers of defendant bank permitted Clark to hold out to the public that said bank had the power to engage in such business and discharge such duties as he (Clark) might determine; that the officers of said bank allowed Clark unlimited scope and latitude in managing and directing the affairs of defendant bank and in transacting any and all business of every name and nature for said bank, regardless of any limitation imposed upon it, or upon the authority of Clark by its written articles of incorporation or by-laws; that by reason of said confidence and authority intrusted to him, the said Clark disregarded any express or implied limitations upon the authorized business and pursuit of said bank as expressed in its articles of incorporation and by-laws and conducted the business of the same by such methods, practices, ways, means, and policies as suited his, Clark's, convenience; that the defendant bank did not, at any time, or in any manner, repudiate or question the validity of such written guaranty until the same became fully executed, and not until after the insolvency of the drug company and until it had become impossible to collect the rent or any part thereof from the said drug company; that the plaintiff entered into the contract with the drug company relying upon the guaranty of the bank to pay the rental for the full term of said lease

in the event that the drug company failed to make such payment.

Trial was had before the court. Findings of fact were made and judgment entered in favor of the plaintiff and against the defendant bank for the full amount claimed, to wit, \$8,074.78, and ten per cent. of that amount as attorney's fee, which was adjudged to be a reasonable attorney's fee, and for interest. From that judgment the defendant bank appeals to this court.

Numerous assignments of error are made by appellant, and, in the language of the respondent's brief, "appellant has assigned errors to substantially every step taken or act done leading to the judgment in this cause." 1 However, the points chiefly argued, and which, in our judgment, are the only ones necessary for the determination of this appeal, may be conveniently stated thus: (1) Was or was not the action of the president of the bank in executing the writing, which is an attempt to guarantee the payment of the rent stipulated to be paid by the drug company to the plaintiff in the written lease attached to the complaint, *ultra vires* as to the bank? (2) Was the fact of executing the said guaranty *ultra vires* and beyond any authority delegated by express act of the bank or its officers to Clark, as president or otherwise, and therefore not binding upon the bank? (3) Were the acts or methods of doing business by the bank, or its officers, such as would estop the bank from denying the authority of its president to bind it by the act taken and done by him?

There is but little conflict in the testimony upon the main issues in this case. The defendant bank was organized under the laws of this state for the purpose of carrying on a banking business, and any powers exercised by it were such powers as it had under its articles of incorporation and the statute defining the powers of banking corporations. The clause stating the objects of the bank, as shown in the record, and which is not disputed, is as follows:

"The business agreed upon and for the pursuit of which this corporation is formed is the banking business in all its

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branches, including both commercial and savings bank departments, in Salt Lake City, Utah, and to carry out said purpose this corporation shall have power to receive and hold moneys and deposits, to loan moneys, to discount, purchase, take, hold, own, deal in and sell and dispose of notes, bonds, commercial paper, debentures, and all other evidences of value or indebtedness and all kinds of collateral security pertaining thereto; also to collect interest on loans and pay interest on deposits, also to receive, purchase, take, own, deal in and foreclose any and all manner of liens, mortgages, pledges and securities, both real and personal, to protect or secure any loan, discount, advance of money or business this corporation may make or engage in, also to make any and all contracts necessary or proper to carry out any of the above powers. This corporation may lease, or purchase and own and hold all lands and buildings, furnishings, and fixtures necessary or proper for its use in conducting its business; and this corporation may also purchase on foreclosure or execution sale, and acquire to protect its demands, and own such other lands and buildings and real property, and property of all kinds, as it may find necessary or proper to acquire in the due course of its business above mentioned; this corporation may also install in its banking house or houses, safety deposit boxes and vaults and may also rent the same to the public; and it shall also have the power, rights and privileges belonging to a banking corporation under the laws of the state of Utah, or under the customs and usages of banking."

Article 9 of the articles of incorporation is in the following words:

"The officers of this corporation shall consist of a board of seven directors, a president, a vice president, a secretary and a cashier, all of whom shall be elected by the stockholders at their first annual meeting, and annually thereafter."

Article 10 of the by-laws of the said defendant corporation is as follows:

"The president shall preside at all meetings of the directors of said corporation. He shall have general supervision and management of the affairs of said corporation, subject to the

control of the board of directors, and shall sign and acknowledge all releases of mortgages, and liens in favor of said corporation, as well as all other instruments to be signed by said corporation in its ordinary course of business, and said president shall have such other and further duties as may be imposed upon him by the board of directors.”

It is always advisable and, in fact, necessary, in attempting to determine the powers of a corporation or other body created by law, to examine the fundamental law of the state by virtue of which such bodies exist, and ascertain, if possible, the powers intended to be given to and to be exercised by such legal entities. Article 12, section 10, of the Constitution of this state limits the powers of corporations to the authorized objects expressed either in the object clause or in the positive statute of the state. The language of that section is:

“No corporation shall engage in any business other than that expressly authorized in its charter, or articles of incorporation.”

This court, in an early case under statehood (*Seeley v. Canal Company*, 27 Utah, 179, 75 Pac. 367), adopted the rule that a corporation in the management of its affairs and conduct of its business is limited to the purposes provided and enumerated in the object clause of its articles of incorporation. In fact, under the provisions of the Constitution, aforesaid, it would seem that no other rule or construction was permissible in this jurisdiction. The principle stated in that case is, at least by inference, reaffirmed in *Christensen v. Realty Co.*, 42 Utah, 86, 129 Pac. 412.

Banks, of necessity, are quasi public corporations. While they are organized for profit, nevertheless not only the stockholders but the depositors are interested in the management and control of such institutions, and have 2, 3 the right to assume that such banking corporations will not engage in any business or enterprise not connected with the powers given it under the law or reasonably implied from the powers expressed. Implied powers of a bank, or of any corporation for that matter, are those incidental to and connected with the carrying into effect or the accomplish-

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ing of the general purposes of the corporation, as expressed in the object clause of its articles. When it has been determined that the acts done, or attempted to be done, are not within the powers of the corporation to do, no implied powers can validate such acts. *State v. Newman*, 51 La. Ann. 833, 25 South. 408, 72 Am. St. Rep. 477; *Clark & Marshall, Corp.* section 128. Since the corporation itself could not execute the contract in question, it could not, by any act, delegate such authority to its officers. *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank*, 62 Neb. 472, 87 N. W. 156; *Lucas, Cashier, etc., v. White Line Trans. Co.*, 70 Iowa, 541, 30 N. W. 771, 59 Am. Rep. 449; *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334.

We now have to consider whether, under the circumstances and facts as disclosed by this entire record, there had been such acts on the part of the bank or its officers that the bank should now be estopped from disputing the authority of the defendant Clark, president of said bank, to enter into and execute the written guaranty that he did execute as shown by the findings and admitted facts in this case. An effort was made all through the hearing to show that Clark had been given and allowed the right to conduct the affairs of the bank in such manner, and to adopt such methods, as he might determine, regardless of any action or control over the bank by the directors or its other officers. Upon a careful examination of not only the abstract, but of the transcript, which contains all the testimony heard and considered by the court, we are unable to find any acts on the part of the bank or its directors that would warrant the conclusion or finding that the president of the bank had any authority to enter into the contract of guaranty which is the basis of plaintiff's cause of action. It is true that the defendant Clark, president of the bank, was given liberal authority in lending the funds of the bank and in the management of its business, but there is no hint in the record that he was authorized or permitted to engage in any business, or to expend the bank's money, or to lend its credit for any other purpose than what might be considered legitimate busi- 4

ness for a bank engaged in commercial banking. It was attempted to be shown that defendant Clark had rented property not immediately used by the bank in conducting its business; but it appears that such property had been leased direct to the bank, was located either over the first floor where the bank was situated, or property situated contiguous to it on either side and located on the same lot, and was the property of the same landlord who owned the bank building, and that the bank took these leases for the purpose of making profit and, in a measure, to control its neighbors, that is, to determine the class of neighbors which should occupy the premises adjoining the bank building. Those leases ran directly to the bank, and were not for the benefit of any third person, and were not an effort to lend the bank's credit to a third party. It is further definitely established that the officers of the bank knew nothing about the acts of its president, H. P. Clark, in executing the written guaranty until several months after the paper had been executed, and that, immediately upon learning of the act of its president, the board of directors repudiated such attempted acts on the part of its president, passed a resolution repudiating the same, and declared that the president had exceeded his authority in signing the paper, and notified the plaintiff of its action. It is true that the contract had been fully executed, but it is also true that the president of the plaintiff corporation knew that the powers of the defendant corporation were limited. In his testimony Mr. Tracy, the president of the plaintiff corporation, stated:

“At the time I was dealing with the Merchants' Bank in relation to this so-called guaranty I had had dealings for many years with corporations. I was familiar with the fact that corporations have limited powers, and familiar with the fact as to how those powers were limited; that is, that they had to prepare and file articles of incorporation with the secretary of state. Yes, in a measure I was familiar with the fact that a corporation cannot exercise any power except the power that was expressly granted to them in their articles of incorporation. I did not at any time prior to the execution

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of this guaranty consult the records of the secretary of state's office to find what the corporation powers of the Merchants' Bank were."

Mr. Tracy, the president of the plaintiff corporation, who testified as above set out, knew the limited authority of defendant corporation, and if not bound by the provisions of the articles of incorporation, which we think he was, as that is a matter of public record, the plaintiff would at least be bound by the provisions of the statute which define its corporate powers. "Strangers or third persons are presumed to know the law of the land, and are bound, when dealing with corporations to know the powers conferred by their charters." *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413, 74 N. W. 162, 70 Am. St. Rep. 334.

Plaintiff contends, and the court found, that at the execution of the alleged written guaranty valuable securities were left with the defendant bank to indemnify it against any loss it might sustain by reason of executing the guaranty. The testimony on that point is not at all clear or satisfactory. It appears that one J. P. Treasurer, the president of the drug company, and who procured the signature of defendant Clark to the guaranty, was at that time indebted to the bank on his personal account, and the bank held his notes for something like \$4,500; that whatever securities the bank held had been left long prior to the date of the alleged guaranty with the bank to secure the personal indebtedness of said Treasurer. It also appears that much of the security, which consisted of corporate stock, was not the property of Treasurer, but was the property of his wife and his brother, and that they had loaned him such securities to pledge as collateral for his individual indebtedness, and he had no authority to pledge that security to secure any obligation of the drug company. It is true that there was some stock belonging to Treasurer which was then at the bank, which, according to the testimony, he stated to defendant Clark could remain with the bank. The bank should not be permitted to profit by any securities left with it to secure it against loss by reason of executing the alleged guaranty, but,

the act itself, being beyond the authority of the bank, could not be binding upon it, and no judgment could be rendered against it. The bank should be required to account for any securities, if any, which it holds to indemnify it against loss.

There is much force in the contention of the plaintiff that by reason of the acts of the president of the bank in executing this written guaranty it, the plaintiff, has obligated itself and will sustain loss. It must be held that plaintiff accepted the guaranty, knowing that the bank had no power to execute such a paper, and that others besides the president of the bank were interested whose rights had not been consulted and whose rights were liable to be jeopardized, not only stockholders, but depositors as well. If there is to be no limit placed upon banking institutions in lending their credit to such schemes or enterprises as the executive officers of the bank may deem advisable, then the confidence of the public in banking institutions will be greatly impaired, and the legitimate and proper functions of banks turned into devious channels of speculative investments.

We have not attempted to review in this opinion the numerous authorities cited by both the appellant and the respondent in their very able briefs and arguments presented to the court. To do so would require an examination of the Constitutions of the different states and the statutes under which such banking institutions were operating, which would be a useless and a burdensome task and would serve no good purpose, in view of the provisions of our own Constitution and the decisions of this court.

It follows that the lower court erred in not sustaining the defendant's motion for a nonsuit and in overruling its motion for a new trial. The cause is therefore reversed, with directions to the lower court to grant the defendant bank a new trial. Appellant to recover costs on this appeal.

McCARTY, CORFMAN, and THURMAN, JJ., concur.

FRICK, C. J.

I concur. I desire to state, however, that I base my concurrence upon the ground that the act of Clark in executing the

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written guaranty, under our Constitution and statute, was entirely beyond his power; and upon the further ground that the written guaranty was also beyond the power of the bank. I desire to add, further, that, although the guaranty is void for the reason stated, and, therefore, the bank cannot be held legally liable, yet if the bank has received any property or funds as a part of the ultra vires transaction, it should be made to account for the same. In my judgment the doctrine of estoppel is not involved in this case.

In re HANSON'S WILL

No. 3066. Decided August 9, 1917. (167 Pac. 256.)

1. NEW TRIAL—NOTICE OF MOTION—TIME FOR FILING—STATUTE. Under Comp. Laws 1907, section 3294, providing that the party intending to move for new trial must within five days after verdict, if the action were tried by a jury, or after notice of the decision of the court or referee, if tried without a jury, file with the clerk and serve on the adverse party a notice of his intention, designating grounds, etc., proponents' second notice of motion for new trial, filed more than five days after the jury returned its special verdict, though within five days after judgment denying probate was entered, was properly stricken from the files as filed too late.¹ (Page 212.)
2. TRIAL—SPECIAL AND GENERAL VERDICTS. Where the special verdict covered every issue, general verdict was unnecessary to authorize judgment on the verdict. (Page 213.)
3. WILLS—PROBATE—CONTEST—EXAMINATION OF WITNESSES. Where there is a contest of a will offered for probate, the witnesses may be required to answer all questions respecting the due execution of the will and the mental capacity of testator at execution before the jury, with the privilege of cross-examination by the protestant, so that, in a will contest, the court properly impaneled the jury before hearing evidence respecting due execution. (Page 213.)
4. WILLS—CONTEST—BURDEN OF PROOF. It is the duty of the proponent of a will to produce his proof respecting the mental capacity of testator at execution and respecting due execution, the burden of proof being upon proponent as to such preliminary matters, but when he has made out a prima facie case by such proof, the burden of proof is on

¹ *Fisher v. Emerson*, 15 Utah, 517-622, 50 Pac. 619, distinguishing *Yerrick v. District Court*, 48 Utah, 619, 161 Pac. 55.

the protestant to overcome such case, and to produce proof respecting the matters presented in his protest. (Page 214.)

5. **WILLS—INSANITY OF TESTATOR—EVIDENCE.** In a will contest on the ground of insanity, contestant must establish the fact of insanity by a preponderance of the evidence.¹ (Page 215.)
6. **WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.** The burden of proof in the issue of undue influence rests with the protestant.² (Page 215.)
7. **TRIAL—FAILURE TO CHARGE—NECESSITY OF REQUEST—UNDUE INFLUENCE.** Under Comp. Laws 1907, section 3147, providing that, when the evidence is concluded, the court shall instruct the jury in writing upon the law applicable to the case, in a will contest, where the court ruled at the beginning of trial that the burden of proof was on the proponent, but, in charging the jury, charged that as to the issue of insanity only the burden of proof was on the protestant, the court erred in failing to charge as to the burden on issue of undue influence, though proponent's counsel did not request an instruction thereon. (Page 217.)
8. **WILLS—RIGHT OF TESTAMENTARY DISPOSITION.** If testator was of sound and disposing mind and memory when he made his will, under the law he had the sole right to choose the objects of his bounty, and it is immaterial whether what he did was approved or disapproved by court or jury. (Page 220.)
9. **APPEAL AND ERROR—REVIEW—FINDINGS OF JURY.** In a law case the Supreme Court has no right to interfere with the jury's findings based on any substantial evidence, but the court cannot permit a judgment to stand unless it is based on findings based on some substantial legal evidence. (Page 220.)
10. **WILLS—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.** In a will contest, evidence held insufficient to support a jury finding of undue influence. (Page 220.)
11. **WILLS—UNDUE INFLUENCE—PROOF.** Though undue influence is seldom subject to direct proof, but, as a general rule, must be established by inferences and circumstances, a finding of undue influence cannot rest on mere suspicion. (Page 220.)
12. **EVIDENCE—SANITY OF TESTATOR—OPINION TESTIMONY.** Though it is proper to permit witnesses, testifying on probate of a will on the subject of mental incapacity, after detailing the facts to express an opinion respecting testator's sanity on the date of execution, the facts on which the opinion is based should be relevant to the issue, and not too remote in point of time, the test being whether testator had testamentary capacity when the will was made, so that the inquiry should

¹ *In re Estate of Van Alstine*, 26 Utah, 193-208, 72 Pac. 942.

² *Miller v. Livingstone*, 31 Utah, 419, 88 Pac. 338; *Anderson v. Anderson*, 43 Utah, 26, 134 Pac. 553.

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be limited to a period of time not too remote from that event. (Page 221.)

13. **WILLS—TESTAMENTARY CAPACITY—ECCENTRICITIES AND IDIOSYNCRASIES—"INSANITY."** Eccentricities and idiosyncrasies, however gross, do not constitute "insanity," and cannot incapacitate one otherwise mentally sound from making a valid will. (Page 222.)
14. **WILLS—SANITY OF TESTATOR—SUFFICIENCY OF EVIDENCE.** In a will contest, evidence *held* to support the jury's special finding that testator was not insane when he made the will. (Page 222.)
15. **EVIDENCE—CAPACITY AND UNDUE INFLUENCE—OPINION TESTIMONY.** Though in will contests great latitude is necessarily permitted in introducing evidence on the question of mental capacity and undue influence, courts should be careful to confine the evidence within reasonable limits, and opinions of lay witnesses should not be permitted unless the witnesses possess personal knowledge as to the facts on which their opinions are based. (Page 222.)
16. **EVIDENCE—OPINION TESTIMONY—INSANITY OF TESTATOR.** In a will contest, opinion testimony of lay witnesses as to testator's insanity, one of the witnesses stating that she based her opinion simply on what she saw and what she heard her mother say about testator, never having herself talked with testator, and having had little to do with him since her mother's death, five years ago, the other witness basing his opinion on matters occurring 10 or 12 years before testator's death, was inadmissible as too remote, since where, from the facts detailed by the witness, the jury may draw an inference that the subject of the inquiry was of unsound mind, the witness may also be permitted to express his opinion, but where no such inferences are deducible from the facts, the witness may not give his opinion. (Page 223.)
17. **APPEAL AND ERROR—DIRECTION OF JUDGMENT.** In a law case the Supreme Court is loth to direct judgment on appeal, except in cases involving law questions only, but, though questions of fact may be involved, if each party has had a fair and adequate opportunity to present his case, courts should not permit the litigation to proceed merely to satisfy a litigious spirit. (Page 224.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Application of Ernest N. MacGregor for probate of will, of Peter Hanson.

From judgment denying probate, the proponent appeals.

REVERSED and case remanded with directions to grant a new trial.

In re Hanson's Will, 50 Utah 207

Geo. Y. Wallace, Jr., for appellant.

Ashby Snow for respondent.

FRICK, C. J.

Peter Hansen, a resident of Salt Lake City, died testate on the 23d day of May, 1916. He left surviving him two sons of the ages of forty-seven and thirty-three years, respectively, and three daughters, aged thirty-eight, thirty-five, and thirty-one years. His wife had obtained a divorce from him in 1904 and thenceforth he continued single, living entirely apart from his family. On the 3d day of November, 1915, or a little more than five months before he died, he executed what is termed his "last will and testament," in which he made one Ernest N. MacGregor and one M. McConnell his residuary legatees and also named them as executors of his will. The testator left the will with MacGregor's wife about six weeks after its execution. In due time the said Ernest N. MacGregor produced the alleged will and filed an application under our statute to have the same admitted to probate. After the application had been filed three of the children aforesaid, to wit, two of the daughters and the youngest son, filed their protest against the admission of the alleged will to probate. The grounds alleged in the protest were: (1) That at the time of the execution of said will the testator was of unsound mind; (2) that said alleged will was not executed as provided by our statute; and (3) that it was obtained by fraud and undue influence. The last ground of contest above named was in the following words:

"That the said decedent at the time of the signing of the said alleged will or document was of feeble and unsound mind, and the said Ernest N. MacGregor and M. McConnell, while the said decedent was of feeble and unsound mind, for the purpose of defrauding the heirs of the said deceased of their interest in his estate by constantly associating themselves with the said decedent and by gaining a predominance over his will and mind by persuasion and inducements, did, as your petitioners are informed and believe, by such persuasion

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and undue influence, overcome the will of the said decedent, if any he then possessed, and did fraudulently and wickedly induce the said decedent to sign his name to the said document or alleged will; that the said signature was obtained wholly by the exertion as aforesaid of such undue influence and fraud exerted upon the mind of the decedent, all of which caused him to sign his name to the said document; and that except for such acts and undue influence the decedent would not have signed his name thereto."

The proponent of the will filed an answer to the protest in which he in effect denied all the allegations contained in the protest, and, on the contrary, averred that the alleged will was duly and properly executed, and that the testator was of sound and disposing mind at the time of its execution, and that he was not influenced, etc.

The issues were submitted to a jury, and they made answer to special findings submitted to them as follows:

"Q. Were there two attesting witnesses, each of whom signed his name as a witness at the end of said document at the request of said Peter Hansen, in his presence and in the presence of the other? A. Yes. Q. If you shall find that said Peter Hansen subscribed the said document, was he at the time of so doing of sound and disposing mind? A. Yes. Q. Was said alleged will procured to be made by the fraud or undue influence of Ernest N. MacGregor or M. McConnell or either of them? A. Yes."

It would seem that the first special finding was unnecessary in view that what is therein contained was admitted in open court by the contestants.

The record discloses that the jury were polled, and that, while all of the eight jurors answered the first two findings in the affirmative, only six of them answered the third finding in the affirmative, and two answered it in the negative.

No general verdict was submitted to the jury or returned by them. The court, however, directed judgment to be entered on the special findings denying the proposed will probate upon the sole ground that "the same was obtained by the

exercise of undue influence." On December 30, 1916, judgment was entered accordingly.

In due time after the jury had returned the special verdict the proponent filed his notice of motion for a new trial, and on January 3, 1917, within five days after judgment was entered, he filed a second notice of motion for a new trial. The court overruled the first motion for a new trial, and, on motion of the protestants, struck the second motion from the files. Counsel for the proponent now insists that the court erred in striking his second motion. We think not.

Comp. Laws 1907, section 3294, provides as follows:

"The party intending to move for a new trial must, within five days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or upon the minutes of the court."

It will be observed that under our statute the application for a new trial is directed against the verdict, and not the judgment, and hence the notice of motion must be given within the time fixed by statute after the verdict is returned, regardless of when judgment is entered. Such is also the holding of this court. *Fisher v. Emerson*, 15 Utah, 517-522, 50 Pac. 619. Nor is there anything to the contrary in the recent case of *Yerrick v. District Court*, 48 Utah, 619, 161 Pac. 55. While the writer's views did not prevail in that case, yet there is nothing in the majority opinion which is contrary to my views there expressed, that under our statute the verdict, and not the judgment, is the thing that is assailed by a motion for a new trial. Indeed that is the clear purport of our statute. Nor was it necessary for the jury to return a general verdict in addition to their special verdict, as contended by counsel for proponent. Comp. Laws 1907, section 3162, provides that a verdict of a jury may be either general or special. In that section the verdicts are defined thus:

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"A general verdict is that by which they [the jury] pronounce generally upon all or any of the issues, in favor of either the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, leaving the judgment to the court."

In this case the special verdict covered every issue, and therefore a general verdict was unnecessary. In case a special verdict does not cover every issue, then, as a matter of course, a general verdict is necessary to authorize a judgment on the verdict. It follows, therefore, that the district court did not err in failing to have the jury return a general verdict in this case. 2

It is next contended that the district court erred in not permitting the proponent to make formal proof of the due execution of the will, etc., before impaneling the jury to try the issues presented by the protestants, and in ruling that the burden of proof was on the proponent. Where there is no contest, the testimony of the subscribing witnesses to the will is usually taken either by deposition or by written answers in open court, or answers are made to the formal statutory questions propounded to such witnesses. Where there is a contest, however, as in this case, then the witnesses may be required to answer all questions respecting the due execution of the will and the mental capacity of the testator at the time of its execution before the jury, with the privilege of cross-examination by the protestants, as in other cases. In 1 Underhill on the Law of Wills, section 86, the author approves the method just outlined. The court therefore did not err in impaneling the jury before hearing the evidence respecting the due execution of the will, etc. 3

Upon the question of burden of proof the district court after announcing the purpose of the several pleadings, ruled as follows:

"The burden of proof will be upon the proponent and he will have the right of opening and closing"

—to which ruling the proponent excepted. The court therefore proceeded to try the issues upon that theory, but in charging the jury entirely omitted to charge respecting the burden

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of proof upon the issue of undue influence, although it charged that the burden of proof on the issue of insanity or mental capacity was on the protestants. With respect to who has the burden of proof upon the question of mental capacity when that is in issue the authorities are in apparent conflict. The divergent views, however, to a large extent at least, are due to the fact that courts have not always discriminated between the trial of a will case where the contest arises before the will is admitted to probate and one where the contest arises after that formality has taken place. There is little, if any, conflict relating to the burden of proof in a case where the contest is initiated after the will has been admitted to probate except upon the ultimate fact in case the mental capacity of the testator is in issue. But there is much confusion in cases like the present, where the contest is initiated before the will is formally admitted to probate.

In a case like the present we conceive the great weight of authority to be to the following effect: That in any case, unless these matters are admitted by the protestant, it is the duty of the proponent to produce his proof respecting the mental capacity of the testator at the time of the 4 execution of the will and the due execution thereof.

As to these preliminary matters the burden of proof is, as a matter of course, upon the proponent; that is, he is bound to make a *prima facie* case. He does that by making proof of the foregoing preliminary matters. When the proponent has made out a *prima facie* case, therefore, then, and then only, the real legal battle begins, and the burden of proof is upon the protestant to overcome the *prima facie* case and to produce proof respecting the matters presented in his protest. In Thompson on Wills, which is a recent work (1916), section 498, it is said:

“Before a will can be probated proof must be made of its proper execution, the testator’s signature, the attestation of the witnesses, the publication of the will, and such like matters, and the burden of proving such facts rests upon the propounder. The proof in support of probate must be sufficient to convince the court that the paper produced is the lawful will of the testator.

“A *prima facie* case is made when it is shown that all the requirements of law have been observed in the execution of the will, and unless such

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prima facie case is made the court should refuse probate even where probate is not contested."

Upon whom ultimately rests the burden of proof in case the mental capacity of the testator is made an issue the authorities are not in harmony. In some jurisdictions the same rule is adopted respecting the burden of proof on the issue of insanity in a will contest that prevails in a criminal 5 prosecution where insanity is a defense, which is that the burden ultimately rests upon the proponent to show that the will is the product of a sane mind by a preponderance of the evidence on that issue. Such is the rule that is laid down by Mr. Schouler in his excellent work on Wills, etc., in volume 1 (5th Ed.), section 174. There are, however, numerous authorities to the contrary in which it is held that the burden of proof rests upon him who makes the allegation and that he must establish the fact of insanity by a preponderance of the evidence. This court, in will contests, is committed to the latter doctrine. *In re Estate of Van Alstine*, 26 Utah, 193-208, 72 Pac. 942. Such is also the holding in some of our neighboring states where statutes like ours are in force. *In re Williams' Will*, 50 Mont. 142, 145 Pac. 953; *In re Murphy's Estate*, 43 Mont. 353, 116 Pac. 1004-1010, Ann. Cas. 1912C, 380. In view that this court, under our statute, is committed to the doctrine before stated, it is not necessary to multiply authorities upon that question. The district court followed the rule announced in the Van Alstine Case, and hence committed no error.

With respect to the issue of undue influence, however, the district court erred in holding that the burden of proof rests on the proponent. The great weight of authority is to the effect that upon that issue the burden of proof 6 rests upon the protestant. Referring again to 1 Schouler on Wills, etc., section 239, the author says:

"The burden of proving fraud or force in the procurement of a will (unlike the simple issue of testamentary capacity) lies upon those who contest the instrument; and anything which imputes heinous misconduct to a party concerned and interested in its execution ought to be fairly established by a preponderance of proof. As to undue influence, in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in question lies still on the party who alleges it,

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either by direct evidence or proof of circumstances inconsistent with fair dealing. In any such case, however, we assume that it has already been proved satisfactorily by the proponents that the will had been duly executed by a person of competent understanding and apparently a free agent. 'In order to set aside the will of a person of sound mind,' observes Lord Cranworth, 'it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis.' And the same holds true where positive fraud or force is the ground of objection. For a testator adjudged competent to make a will may be presumed to have known and intended its contents."

Our own decisions are all to that effect. *Miller v. Livingstone*, 31 Utah, 419, 88 Pac. 338; *Anderson v. Anderson*, 43 Utah, 26, 134 Pac. 553. In those two cases it is also thoroughly explained what is necessary to constitute undue influence.

While, as before stated, at the beginning of the trial the district court ruled that the burden of proof was upon the proponent, yet in charging the jury the court charged that as to the issue of insanity only the burden of proof was on the protestant, and as to who had the burden of establishing the issue of undue influence the court did not charge anything. Counsel for proponent contends the court's failure to charge upon that issue is error. He predicates his argument upon Comp. Laws 1907, section 3147, which provides:

"When the evidence is concluded, the court shall instruct the jury in writing upon the law applicable to the case."

It is contended that it is the duty of the court to charge the jury upon all the material propositions of law "applicable to the case," and that in omitting to charge respecting the burden of proof upon a principal or material issue the court has failed to comply with the provisions of the statute. Counsel for the protestants, however, answer the contention by pointing to the fact that proponent's counsel was himself derelict in not requesting an instruction upon the question of the burden of proof respecting undue influence. With respect to a party's right to request instructions, section 3148 provides:

"Either party may, before the court has instructed the jury, or later by consent of the court, ask special instructions."

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It has frequently been held by this court that, if a party desires to have the jury instructed upon a special matter, he cannot predicate error upon the court's failure to charge unless he has requested a proper instruction upon the subject in hand. This case is, however, out of the usual order. Here the court at the beginning of the trial in open court announced to counsel that the burden of proof was upon the proponent. To that ruling proponent duly excepted. In view, therefore, that the court had ruled respecting the burden of proof, counsel was perhaps excused from a further insistence upon his views in that regard. Moreover, the instruction regarding the burden of proof, under the circumstances of this case, was, in our opinion, not a matter upon which the "special instruction" mentioned in the statute must be asked. The instruction was upon a question of law "applicable to the case," and hence should have been given by the court in its general charge, and especially so since it had announced what the rule was at the beginning of the trial.

While we do not desire to be understood as holding that it would be error under all circumstances to omit to charge upon the question of burden of proof, yet, in view of the peculiar circumstances of this case, we are of the 7 opinion that the court erred in failing to instruct the jury upon the question of burden of proof on the issue of undue influence, and that it was not necessary under all the circumstances of this case for the proponent to offer an instruction upon that question in order to predicate error on the court's failure to charge. Indeed, the finding of the jury upon that subject, as hereinbefore shown, conclusively shows that in this case the proponent was grievously prejudiced by the court's failure to instruct the jury respecting the burden of proof upon the issue of undue influence. We remark that no hard and fast rule can be laid down with regard to the question of when and under what circumstances it may be prejudicial error in case a court fails to instruct upon a particular question, and especially upon the question of burden of proof. Each case must, to a large extent at least, be determined upon its own peculiar facts and circumstances. All

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we hold is that under the circumstances outlined the failure to instruct as before stated constituted prejudicial error.

Counsel, however, also vigorously insists that the finding of the jury that the will in question was obtained by undue influence is not supported by any evidence. We have read the whole evidence with care, and, after doing so, are forced to the conclusion that there is not a scintilla of evidence in support of the finding upon that issue. Indeed, in this case there is not even a syllable of evidence that there was any motive, inducement, or inclination to practice undue influence, or any influence upon the testator. Neither one of the beneficiaries named in the will, not even the testator's children, had any knowledge whatever that he was possessed of any property or means. No one suspected that he had anything in excess of what was "necessary to bury him," as he frequently expressed it to those with whom he held intercourse at all. Nor can it be said that the residuary legatees could have influenced the testator because of their ill will or feeling against the children, since they were total strangers to all of them. Moreover, the record shows beyond peradventure that the testator hoped to spend his last days and to die in Denmark, his fatherland. From his correspondence with friends in that country it is made very clear that had it not been for the breaking out of the present European war he in all probability would have gone to Denmark to spend his last days and to die, and in that event he, as a matter of course, would have taken all of his property, which consisted entirely of savings deposits in one of our savings banks, with him. From the time his wife obtained a divorce in 1904, upon the ground of nonsupport, the testator lived by himself as a recluse in what, in the evidence, is called a shack. In the last eleven years of his life he always posed as being entirely destitute of means, and every one who came in touch with him supposed him to be not only poor, but oftentimes in abject want. The proponent, one of the residuary legatees, his wife, and McConnell, the other residuary legatee, and his wife, after the divorce aforesaid, and after the testator was separated from his family, often befriended him in one way and another.

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They gave him odd chores to do and frequently provided him with meals and gave him newspapers and magazines to read, which he seemed to appreciate. He was afflicted with some throat trouble, was hard of hearing, and also had some difficulty with his eyes. In view of those infirmities he was not excessively gregarious, and always seemed lacking in sociability. McConnell, one of the principal beneficiaries, had not seen him for six years immediately preceding his death, and knew nothing about the will until he was told about it after the testator's death. As before stated, the will was delivered by the testator to the proponent's wife, which act of delivery occurred about six weeks after it was executed. Neither the proponent nor McConnell knew that the testator intended to make a will, much less that he intended to make them his principal legatees. And, what is more, they did not even suspect that he had any property to bequeath to them or to anybody. True, the ward bishop told the relief society that the testator had means and that the society should not further assist him. The testator, however, convinced that society that he was without means, and it assisted him to the end of his life. In his home life he was most unhappy. He was clearly an eccentric, and in some respects very much so, and by reason of his infirmities, as before stated, was at times unfriendly, always unsociable, to say the least. He always seemed untidy in his person and clothing, if not actually filthy, and during many years lived all to himself in the shack before stated. It seems his children did not do anything for him after he was divorced, although one or two sometimes called upon him; and he, even before the divorce, never did anything for them. They did not even know of his last sickness. The testator's feelings respecting his children is clearly reflected in the following statement, which, for some purpose, was introduced in evidence, and which was shown to be in his handwriting, written in the Danish language. This statement was found by one of the witnesses in the shack where the testator lived until the day preceding his death. It reads: "They [his family] got my home and money by false pretend. All this, together, I deem this sufficient because of

the cruel, unjust treatment I received while living with them. After making my life miserable it would be an injustice to my memory for them to share or enjoy any part of what I have by the assistance of kind-hearted and upright friend."

The evidence also makes clear that the foregoing statement was not the result of any hallucination or aberration of mind; that it was based upon the testator's actual experiences. True, his domestic troubles may have been exaggerated 8 by him, as is often the case, but that is of no consequence here. It is beyond dispute, therefore, that the testator left some reason behind him showing clearly what induced him to make his will as he did. If he was of sound and disposing mind and memory when he made it, and the jury found that he was, then, under the law, he had the sole right to choose the objects of his bounty, and it is utterly immaterial whether what he did is approved or disapproved by either court or jury. That right it is the duty of the courts to protect and enforce, and not to fritter it away by entering a judgment which perhaps reflects only their own views, or the views of the jury, regarding the disposition a testator should have made of his property.

This is a law case, and, in view of that fact, we have no right, nor have we the inclination if we had the right, to interfere with the findings of the jury in such a case where such findings are based upon any substantial 9, 10 evidence. We may, however, not disregard both our duty and our oaths of office and permit a judgment to stand, unless it is based upon findings which are based upon some substantial legal evidence. There is no such evidence in this case upon the issue of undue influence, and hence the finding of the jury is not supported by evidence and the judgment is not sanctioned by law. As a matter of law we are required, therefore, to set the findings and judgment aside.

In what we have said we are not unmindful of the protestants' contention that undue influence is seldom subject to direct proof, but, as a general rule, must be estab- 11 lished by inferences and circumstances. While that is true, it likewise is true that a finding of undue influence

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cannot rest upon mere suspicion. There must be some substantial facts upon which the inferences and deductions are based, and the circumstances relied on should clearly point out the person who it is alleged exercised the undue influence and his acts constituting the alleged undue influence. There is absolutely no fact or circumstance in this case authorizing any one to find that the residuary legatees, or any one of them, exercised the slightest influence on the testator. Nor is there any evidence whatever that the will as written was not the sole product of the testator's mind. Under such circumstances it would constitute most flagrant error to permit the judgment to stand.

While the jury found in favor of the proponent upon the issue of insanity, yet, in view that we must reverse the judgment, we feel bound to make a few observations upon that issue. The evidence on part of the protestants was practically all directed to that issue. The testator, as appears from the will itself, was seventy-nine years of age when the will was made. He, in his own handwriting, gave the directions to the scrivener, who prepared the will according to those directions. There is absolutely nothing to indicate that the testator was not fully competent to make a will at the time, and, if his correspondence with his friends in Denmark is considered, he certainly possessed more than sufficient intelligence to make a valid will. The testimony of the scrivener and the other subscribing witness respecting the mental capacity of the testator is likewise clear and convincing.

The witnesses testifying for the protestants upon the subject of mental capacity were all lay witnesses, and, after detailing the facts, the court in every instance 12 permitted the witnesses to express an opinion respecting the testator's sanity on the date the will was executed. Now, while that is a proper method of procedure, and in many cases the most satisfactory method, yet the facts upon which the opinion is based should be relevant to the issue and should not be too remote in point of time. It should always be remembered that in such cases the test is whether the testator had testamentary capacity at the time the alleged will was

made, and the inquiry should be limited to a period of time not too remote from that event. In this case the court permitted one of the witnesses to express an opinion respecting the testator's sanity, although the witness testified:

"Never had any conversation with him [the testator]. I base my opinion simply on what I saw and what I heard my mother say about him."

This, too, notwithstanding the fact that her mother had been dead five years when the witness testified, and the further fact that after the mother's death intercourse between the testator and the witness practically ceased. Another witness based his opinion upon what he concluded was an unintelligent answer on the part of the testator. The witness was asked on cross-examination to give some instance which induced him to question the testator's sanity. He gave an instance occurring perhaps ten or twelve years before the death of the testator. The instance is reflected in the following questions and answers:

"Q. Was there anything irrational in his conversation? When you asked him a question was he able to answer it intelligently? A. Well, I would not call it intelligent. Q. Well, give me his answer that he would make to a question that was not intelligent in your opinion. A. Why, when I asked him to get some gloves for his hands to prevent freezing his fingers, he said he didn't have any money. Q. That is your opinion of an nonintelligent reply to the question? A. Yes, sir. Q. Did you ask him why he did not get any gloves? A. Yes, sir; I asked him why he did not get any gloves, and he said he did not have the money. Q. Can you think of anything else? A. Not at this time."

It is upon instances similar to those just illustrated, and upon the facts that the testator was untidy in his personal habits and dress and at home, and that 13, 14, 15 he had a miserly disposition and an entire lack of affection for his offspring, which were the principal grounds that induced the witnesses to consider him of unsound mind. Indeed, the weight of the evidence is to the effect that they considered him so because he was unlike other men. He was

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not as they observed other men, and expressions of that character. The fact is that the evidence discloses eccentricities on the part of the testator which at times were induced and aggravated by the fact that the testator was afflicted with the physical infirmities of being deaf, of having some ailment of the throat and of the eyes. True, he had some other physical defects, but those were of minor importance. Eccentricities and idiosyncrasies, however gross, do not constitute insanity, and cannot incapacitate one otherwise sound from making a valid will. The finding of the jury that the testator was not insane at the time he made the will is not only supported by, but it is the only conclusion permissible under, the evidence. While in such cases great latitude is necessarily permitted in introducing evidence upon both the questions of mental capacity and undue influence, yet courts should be careful to confine the evidence within reasonable limits, and opinions by lay witnesses should not be permitted unless such witnesses possess personal knowledge respecting the facts upon which their opinions are based.

We think the district court transcended the bounds of reason and the rules of evidence in permitting the two witnesses to express their opinions respecting the sanity of the testator at the time of the making of the will based 16 upon the facts detailed by them. Here again let it be understood that no hard and fast rule can be laid down governing all cases. All that can be said is that a witness should be permitted to state the facts fully, and if from the detailed facts the jury may draw an inference that the subject of the inquiry was of unsound mind, the witness may also be permitted to express his opinion respecting the sanity, and in that way enlighten the jury to some extent upon that question. Where, however, no such inferences are legitimately deducible from the facts testified to by the witness, he may not, nevertheless, give his opinion respecting the mental capacity of the testator. If that were permitted, the witness would entirely usurp the functions of the jury in such cases.

From what has been said it follows that the judgment should be, and it accordingly is, reversed. In view, however, that

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there is no evidence in this case respecting the issue of undue influence, and the evidence on the issue of mental capacity is so strong and clear in favor of the will, the question arises whether we should, as insisted by counsel for the proponent, direct the court to admit the will to probate or whether we should merely reverse the judgment.

This is a law case, and in such cases we are very loth to direct judgment except in cases involving law questions only. Even in law cases sometimes, although questions 17 of fact may be involved, yet if each party has had a fair and adequate opportunity to present his side of the case, courts should not permit the litigation to proceed merely to satisfy a litigious spirit. This court is, however, merely a reviewing court, and notwithstanding the failure on the part of the protestants to make a case, we shall nevertheless merely reverse the judgment and permit the district court to protect the interests of all who are interested in this case.

The case is therefore remanded to the district court of Salt Lake county, with directions to grant the proponent a new trial; costs to be paid out of the assets of the estate.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

MILLS v. GRAY.

No. 2966. Decided August 20, 1917. (167 Pac. 358.)

1. ACTION—NATURE AND FORM—EQUITABLE RELIEF. A party is not entitled to have an action dismissed merely because the relief his adversary is entitled to may be equitable rather than legal.¹ (Page 231.)
2. PARTNERSHIP—ACTION AT LAW BETWEEN PARTNERS. Where there are no partnership liabilities, and there is nothing requiring an accounting between the partners, one can maintain an action against the other to recover his alleged share of the proceeds of the partnership business. (Page 231.)
3. APPEAL AND ERROR—QUESTIONS NOT RAISED BELOW—DEFENSES. If there was any reason why plaintiff should not have prevailed in his action at law to recover his share of the proceeds of the partnership business, it was the duty of defendant to plead it as a defense to the

¹*Morgan v. Child, Cole & Co.*, 41 Utah, 562, 128 Pac. 521.

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action, and, not having done so, he cannot complain on appeal. (Page 231.)

4. **CONTRACTS—ILLEGALITY—BELIEF OF PARTIES.** Where plaintiff, the employee of a mining company, and defendant agreed to mine ore under a lease made with the mining company in defendant's name, plaintiff to pay defendant two-thirds of the expenses, and defendant to pay one-third, the net proceeds derived from the ores to be divided between them in the same proportion, though it was a rule of the mining company that its employees might not be interested in any leases covering any of the company's workings, and though plaintiff knew of such rule, he was not thereby debarred from recovering of defendant his two-thirds share of the proceeds of a shipment of ores. (Page 234.)
5. **ACTION—PURPOSE OF INSTITUTION—ENFORCEMENT OF LEGAL RIGHTS.** Courts are instituted to enforce legal rights, as contradistinguished from moral obligations, and where the legal right is in one against whom the moral obligation is asserted, the legal right prevails. (Page 234.)
6. **TRIAL—IMMATERIAL FINDING.** A finding on a question of fact which could not avail defendant as a defense was immaterial. (Page 235.)
7. **TRIAL—FAILURE TO FIND ON IMMATERIAL MATTER.** Failure to find on an immaterial matter is not an error. (Page 235.)
8. **MINES AND MINERALS—MINING PARTNERSHIP—ACTIONS.** In one partner's action against another to recover his share in the proceeds of a shipment of ores belonging to the partnership, court's findings of fact *held* sufficient to sustain its judgment for plaintiff. (Page 235.)
9. **APPEAL AND ERROR—HARMLESS ERROR—FINDINGS OF FACT.** In such action, the mere fact that the findings were expanded beyond the issues was not prejudicial to defendant. (Page 235.)
10. **APPEAL AND ERROR—REVERSAL—HARMLESS ERROR.** If defendant is not prejudiced in a substantial right, judgment for plaintiff cannot be reversed for mere technical errors. (Page 235.)

Appeal from District Court, Fifth District; *Hon. Joshua Greenwood*, Judge.

Action by David Mills against Abner Gray.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

M. E. Wilson and *J. C. Wood* for appellant.

Edward Pike and *N. W. Sonnedecker* for respondent.

APPELLANT'S POINTS.

In the case of *Riddle v. Ramsey*, 31 Mont. 386; 78 Pac. 597, the court said:

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"The individual interest of one partner in the firm assets can only be ascertained by a settlement of the partnership affairs. * * * Such settlement can only be accomplished by an agreement of the partners or by an action in equity for an accounting and settling of their various interests." Sutherland on Pleadings and Practice of Forms, Sec. 3712; *Murray v. Bogert*, 14 Johns 318; 7 Am. Dec. 466; *Blakely v. Smock*, 71 N. W. 1052; 96 Wis. 611.

In the case of *Ozeas v. Johnson*, 4 Dallas 434; 1 L. Ed. 897, the Supreme Court of the United States said:

"Money received by one partner during the partnership is not received for the use of either but for the use of both the partners. All that either partner is entitled to is moiety of what remains after all the partnership debts are paid, and the proper remedy for one partner against the other to obtain a settlement and payment is an action of account render." (*Course v. Prince*, 1 Mill 416; 12 Am. Dec. 649; *Müller v. Freeman*, 111 Ga. 654; 51 L. R. A. 504; *Kunneke v. Mapel*, 60 Ohio State, 1.)

"The law of partnership is well settled that when the question is one of division of profits the presumption is that the profits are to be divided equally. Furthermore, such equality will be presumed notwithstanding the fact that the contributions to the firm capital are not equal." (22 Am. and Eng. Enc. of Law, 2d Ed., 101; *Johnson v. Jackson*, 114 S. W. 260; 130 Ky., 751; *Griggs v. Clark*, 23 Calif. 427; *Ratzer v. Ratzer*, 28 N. J. Eq. 136.)

"Loyalty to his trust is the first duty which the agent owes to his principal. Without it the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies. In some it is so much the inspiring spirit that the law looks with jealous eyes upon the manner of their execution and condemns not only as invalid as to the principle but as repugnant to the public policy everything which tends to destroy that reliance." (*Northwestern National Bank v. Great Falls Opera House*, 57 Pac. 440; 23 Mont. 1.)

In the case of *Woodstock Iron Company v. Richmond and Danville Extension Company*, 129 U. S. 543; 32 L. Ed. 819,

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where the defendant had a contract with the Georgia Pacific Railway company to construct a railroad from Atlanta, Ga., to Columbus, Mississippi, for a consideration of Twenty Thousand Dollars per mile, the Woodstock Iron Company agreed that if the Extension Company would locate the railroad by way of the town of Anniston the Iron Company would convey to the Extension Company divers parcels of land. It was for the enforcement of this contract that the action was brought. The court said:

"A court of equity will not enforce a contract resting upon such official delinquency, or even tending to produce it. Such is the character of the contract before us. If we enforce it we lend the sanction of the court to a class of contracts, the inevitable tendency of which is to make the officers of those powerful corporations pervert their trust to their private gain at the price of injury at once to the stockholders and to the public." (*Bell v. McConnell*, 37 Ohio St. 396; *Clark & Skyles on Agency*, Section 781; *Findlay v. Pertz*, 66 Fed. 427; *McKinley v. Williams*, 74 Fed. 95.)

RESPONDENT'S POINTS.

"Still there seems to be ground for a distinction between contracts which are held to be against public policy merely on account of the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class parties acquire no rights which can be enforced either in courts of law or equity. But in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it, to accept and retain the benefit without any compensation at all." 6 Ruling Case Law, Sec. 126, p. 720.

The difference between the two classes is that a void contract will not be enforced one way or another by the court even when a party is suffering injustice, the parties being in *pari delicto*, but a voidable contract will be enforced until it is set aside by the action of the party to it who has a right to object.

This distinction is well settled in the law of this state, and was first enunciated in a case involving money arising from a sale of lottery tickets, the language of the syllabus is:

“Fourth, that both parties being engaged in a criminal enterprise, both are principals under the laws of Utah, and that the relation of agent and principal does not exist.” (*Mex. Banking Co. v. Lichtenstein*, 10 Utah, 338.)

FRICK, C. J.

The plaintiff, in substance, alleged in his complaint that he and the defendant, at a time stated, entered into an agreement to mine ores under a certain lease which had been entered into with the Gemini Mining Company in the name of the defendant; that the plaintiff agreed to pay the defendant two-thirds of the expenses incurred in mining said ores under said lease, and that the defendant agreed to pay one-third thereof, and that the net proceeds derived from said ores were to be divided between them in that proportion; that the mining company under said lease was to ship, and that it did ship and market, all the ores as mined and retained the title thereto until it had received its royalties under the lease, and after shipping the ores mined as aforesaid said mining company deducted its royalties and paid the remainder to the defendant; that the plaintiff and defendant had continued to mine ores on said terms for some time, and that the proceeds of the shipments had always been divided between plaintiff and defendant in the proportion aforesaid until the last shipment was made under the lease aforesaid; that the last shipment was made in July, 1914, proceeds of which, after the mining company had deducted its royalties and expenses, netted the sum of \$1,010.31, all of which was by said company paid to and received by the defendant; that plaintiff is entitled to two-thirds of said amount amounting to \$673.54 which he has demanded from the defendant and which defendant refuses to pay plaintiff. Judgment was prayed for that amount, with legal interest from the date it was received by the defendant.

The defendant filed an answer to the complaint in which he, in effect, denied all the allegations of the complaint. There-

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after he filed an amended answer in which he, in substance, averred that at the times mentioned in the complaint the plaintiff was an employee of the Gemini Mining Company mentioned in the complaint; that during all of the time that plaintiff and defendant were engaged in mining ores under the lease mentioned in the complaint there was in force a rule which had been promulgated by said company whereby all of its employees, including the plaintiff, were prohibited from being interested in any mining leases covering any of the underground workings of the company's mine; that the plaintiff was employed as an underground foreman in said mine and was charged with the duty of preventing lessors from taking ores outside of the boundary lines of their respective leases, and was also charged with the duty of protecting and preserving the best interests of said company in that regard; that the plaintiff had violated the rule aforesaid and had disregarded the trust imposed on him as aforesaid. The defendant also averred that the contract or agreement existing between the plaintiff and the defendant under which said ore was mined and shipped by reason of plaintiff's misconduct as aforesaid was illegal and void. The defendant prayed judgment "that the suit of plaintiff be dismissed." The cause was tried to the court without a jury. The court found the facts as follows:

"That during the time from the 1st day of January, 1914, to the 10th day of July, 1914, the parties to this cause were engaged in the mining of ores belonging to the Gemini Mining Company under a lease agreement entered into between the said mining company and the defendant herein, Abner Gray; that the said mining was carried on under the name of Abner Gray & Co., the said Gemini Mining Company shipping the lots of ore as mined by Abner Gray & Co. and paying the net proceeds provided for by the said lease agreement by check payable to the said Abner Gray & Co. during all of the said time; that the said Abner Gray & Co. had no fund with which to conduct the said mining operations and was engaged solely in mining ores belonging to the said Gemini Mining Company, the plaintiff, David Mills paying two-thirds of the money necessary to carry on said business and the defendant one-third thereof;

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that the net proceeds arising from the sale of ores so mined belonged to the parties hereto individually, and that two-thirds thereof belonged to the plaintiff, David Mills, and one-third to Abner Gray, the said Abner Gray acting during all of the said times herein mentioned as the agent of the said mining company for the purpose of receiving the said money and also acting as the agent of the said David Mills for the sole purpose of receiving it for him and paying it over to him; that on the 10th day of July, 1914, the said Abner Gray was acting as the agent of the plaintiff herein, David Mills, and as such agent received the sum of \$673.53, which he upon demand therefor refused and still refuses to pay over to the said David Mills; that while acting as such agent he was not acting in his capacity as partner, but solely as the agent of the plaintiff, David Mills, to receive and pay over money belonging to the said Mills individually."

The court also found, as a conclusion of law, that the plaintiff was entitled to judgment as prayed for, and entered judgment accordingly.

The defendant has appealed and has assigned numerous errors which his counsel in their brief reduce to five points or propositions. We shall consider those deemed material.

The first point argued is that this is an action at law between partners arising out of partnership transactions and that such an action cannot be sustained. The contention is that the action should have been in equity for an accounting between the partners, and that until an accounting is had and the liabilities of the partnership are ascertained and a balance is struck an action at law by one partner against the other will not lie. The precise question now raised was presented for consideration in the case of *Morgan v. Child, Cole & Co.*, 41 Utah, 562, 128 Pac. 521. In that case Mr. Justice Straup, after stating the issues, stated the proposition decided in the following words:

"Upon these issues the case was partially tried to the court and a jury. At the conclusion of plaintiff's evidence, the court, on the defendant's motion, granted a nonsuit on the ground that the contract, and the evidence adduced by the plaintiff, show that he and the defendant were copartners in the transaction, and that an accounting between them was a prerequisite to the maintenance of the action, and 'that the plaintiff had no right to sue the defendant at law,' and had 'mistaken his remedy, if any he has.' A judgment of dismissal was thereupon entered, from

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which the plaintiff has prosecuted this appeal. It is seen that the motion was granted and the action dismissed, not on the ground of insufficiency of evidence, but on the ground of a mistaken remedy. We think the trial court erred. In this, as in many other states in which the formal distinctions between actions at law and suits in equity are abolished, the court may administer relief according to the nature of the cause set out, whether it is such as would be granted in equity or such as would be given at law. 3 Cyc. 737. Our Constitution (section 19, art. 8) expressly provides that 'there shall be but one form of civil action, and law and equity may be administered in the same action.' *Volker-Scooveroft Lumber Co. v. Vance*, 36 Utah, 348, 103 Pac. 970, 24 L. E. A. (N. S.) 321, Ann. Cas. 1912A, 124.

A party, therefore, is not entitled to have an action dismissed merely because the relief his adversary is entitled to may be equitable rather than legal. That, however, is 1, 2, 3 just what counsel are seeking to accomplish here. The decision in *Morgan v. Child, Cole & Co.*, supra, is however, as we have seen, directly contrary to their contention. Moreover, the very case upon which counsel rely, namely, *Kunneke v. Mapel*, 60 Ohio St. 1, 53 N. E. 259, avails them nothing. In that case it appeared that the defendant in error, as a partner, commenced an action in equity for an accounting against the plaintiff in error. The plaintiff in error set up as a defense that in a prior action at law he had obtained judgment against the defendant in error upon a certain claim arising out of the partnership transactions sued for in the complaint filed by the defendant in error; that the matters involved in the present action were also involved and adjudicated in the former action. The Supreme Court of Ohio, in the case cited, held that inasmuch as the defendant in error was sued at law he should have set up the matters he is now suing for as a defense in the former action, and having failed to do so he had waived or lost the right to relitigate the matter in the present action. In other words, the matter set up, the court held, was *res adjudicata*. As pointed out before, the only defense that the defendant pleads in this action is the illegality of the agreement existing between the plaintiff and the defendant under which the ores were mined from which the proceeds that are in question here were derived. Not a word is pleaded in defendant's answer that an accounting is necessary or that there are any partnership liabilities, or any other liabilities for that matter, that were unad-

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justed between the plaintiff and the defendant. If we should hold, therefore, that, ordinarily, one partner may not sue his copartner for his share of the profits arising out of partnership transactions until an accounting has been had between the partners and the liabilities have been fully ascertained and adjusted and a balance struck, yet there is absolutely nothing made to appear in this case that such an accounting is necessary or that there are any liabilities owing by the partners to any one which grew out of or had any connection with the mining of the ores in question. If we consider the plaintiff and the defendant partners in that venture the partnership was very limited indeed. If there are no such liabilities therefor, and there is nothing requiring an accounting, we can see no reason whatever why this action to recover plaintiff's alleged share of the proceeds derived from the shipment of ores in question was not as proper as any other action would be. Nor do we see why, as pointed out in *Morgan v. Child, Cole & Co.*, supra, all of the matters could not have been determined in this action. That such an action may be maintained under such circumstances is the effect of the authorities. Among others we refer to *Pettin-gill v. Jones*, 28 Kan. 749; *Wheeler v. Arnold*, 30 Mich. 304; *Feurt v. Brown*, 23 Mo. App. 332. If, therefore, there was any reason why the plaintiff should not have prevailed in this action it was the duty of the defendant to plead it as a defense to the action, and not having done so he cannot now complain.

It is, however, also contended that the plaintiff cannot recover judgment in this case for the reasons pleaded in the answer, namely, that he had violated an alleged rule of the company that an employee cannot be interested in any lease granted by the company for mining ores. There is no evidence in the record that the company ever had promulgated such a rule. The secretary of the mining company testified that he knew of no such rule, but said that it was "understood" that the employees should not be interested in leases, etc. For the purposes of the decision we shall, however, assume that there was such a rule promulgated by the company, and although the plaintiff testified, and his evidence is not contradicted, that he did not know of such a rule, we shall also assume that he did know.

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The evidence is without dispute that the defendant turned over to the company all ores mined under the agreement between the plaintiff and the defendant; that after shipping the ores to market, disposing of them and deducting the expenses and the royalties coming to it, the company paid over to the defendant the net proceeds which, except those derived from the last shipment, were divided between plaintiff and defendant, one-third to the latter and two-thirds to the former; that the defendant determined the cost of mining the ores, and when he had done so presented the account to the plaintiff who always paid his two-thirds as agreed upon. Now, if it be assumed that plaintiff transgressed the rule of the company, how is that a defense in favor of the defendant? By what principle of law or rule of morals is the defendant entitled to appropriate plaintiff's money because he might have violated some rule of his employer, the mining company? How does that fact give the defendant any right to claim plaintiff's money? Defendant's counsel have cited and relied upon the following authorities as sustaining their contention: *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *City of Findlay v. Pertz*, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188; *McKinley v. Williams*, 74 Fed. 94, 20 C. C. A. 312, 6 R. C. L. 720, and, 2 Clark & Skyles Agency, Section 781. The principle announced in the foregoing cases is well and clearly stated in 2 Clark & Skyles, Agency, *supra*, in the following words:

“As a general rule, a broker cannot act as agent for and receive commissions from both parties to the same transaction, unless they are fully informed that he is so acting for both. It is clear, both upon principle and authority, that in case of such double employment he can recover from neither, where his employment by the other has been concealed from and not assented to by the defendant. It is contrary to public policy to allow the broker a right of action against both parties for his commissions, and it is well settled that he does not have such right, although he may have acted in good faith; and evidence cannot be introduced to show a custom or usage among brokers to charge a commission to both parties in such cases.”

The same principle is stated in another form in the case of *McKinley v. Williams*, *supra*. In that case the agent so conducted the business intrusted to him by his principal that he

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derived profits therefrom, and it was held that he must account to his principal for the profits he thus made 4
and withheld. There is nothing in that case, however, from which any one can conclude that the parties with whom the agent dealt and transacted the business and from whom the profits were derived would have had the right to withhold the money from him merely because he ought to account to his principal. Nor is there anything in any of the other cases cited, or in any other, that sustains counsel's contention as broadly as they make it. It is, however, not even claimed that in this case the plaintiff obtained something that either in law or in equity belonged to his principal, the mining company. If he has obtained anything coming within the rule stated above it is a matter with which the defendant is not concerned. He does not claim that he suffered any loss or even inconvenience by reason of plaintiff's conduct, and hence he cannot complain.

It is, however, contended that the agreement between plaintiff and defendant under which the ores were mined and the proceeds sued for were obtained was against public policy and void. The only authorities cited in support of that contention are those we have already referred to. 5
There certainly is nothing in those cited which sustains counsel's contention, and we know of no reason or authority why the mere private matters between the mining company and its employees respecting the leasing of the company's mining grounds are controlled by the somewhat expansive term of public policy. And if, in some respects, such were the case, yet we cannot see how the defendant can acquire property or money to which he has no legal claim or right except that the plaintiff has violated some rule or public policy which merely affects the plaintiff and another. It is not always easy to determine the precise point where the somewhat indefinite term of public policy begins or where it ends. It is, however, safe to assert that it has never been so applied as to take property or money from one person to give it to another merely because one of them may not in all things have lived up to the moral code. Courts are instituted to enforce legal rights as contradistin-

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guished from moral obligations. Where the two unite in the same person, as is very often the case, both are enforced; but where, as here, the legal right is in one against whom the moral obligation is asserted the legal right prevails. As we have seen, the only defense the defendant interposed is that the plaintiff has transgressed against some rule of his principal. If that were so it would be a matter for the plaintiff and his principal to adjust, and the defendant cannot avail himself of it as a defense in a case like this.

Nor is there any merit to the contention that the court erred in not making a finding upon the question of whether the mining company had promulgated the rule contended for by the defendant. As we have shown, even though there were such a rule it cannot aid the defendant. 6, 7 That is, it cannot avail him as a defense to the action. If that be so, then it is wholly immaterial whether there was such a rule or not. The finding would therefore have been on an immaterial matter, and the failure to find upon such matter does not constitute error.

It is, however, also insisted that the findings made are broader than the issues presented by the pleadings. We have set forth the substance of the pleadings and have set forth the findings in full. While it must be conceded that neither are artificially drawn and that both contain 8, 9, 10 evidentiary matter, yet no one can read the findings and not arrive at the conclusion that they are sufficient, and that the mere fact that they are expanded beyond the issues is not prejudicial to the defendant. If the defendant is not prejudiced in a substantial right the judgment cannot be reversed for mere technical errors. Here is a case where the defendant confessedly has in his possession a certain sum of money which in justice and right he should pay to the plaintiff, yet he refuses to do so, not upon any substantial or meritorious ground, but purely upon technical and immaterial grounds. Under such circumstances mere technical errors, however numerous, cannot serve as an excuse to set aside a judgment otherwise right and legal. Nor is there any merit to the contention that the court erred in admitting evidence over the objections and exceptions of the defendant. The case

was tried to the court, and even though it were conceded that the court had committed error in that regard, yet the alleged errors pointed out by counsel in that regard are almost trivial.

Lastly, it is insisted that the judgment is not supported by the findings. As before suggested, a mere cursory reading of the findings will disclose that there is sufficient in them to sustain the judgment, and that this objection should not prevail.

For the reasons stated, the judgment should be, and it accordingly is, affirmed, with costs to respondent.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

BREWER v. ROMNEY et al.

No. 3060. Decided August 20, 1917. (167 Pac. 366.)

1. **BILLS AND NOTES—SUFFICIENCY OF ANSWER—DENIAL—STATUTE.** Under Comp Laws 1907, section 2968, subd. 1, requiring an answer to contain a specific denial of each material allegation of the complaint controverted, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations, and also a general denial of all the allegations, not specifically admitted or denied, an answer in a suit on a note and to foreclose a mortgage on realty, denying all the allegations of the complaint and affirmatively alleging the execution of a note to plaintiff, but denying that it was in form or legal effect as set out in the complaint, did not put in issue and sufficiently state a defense to all the material allegations of the complaint. (Page 239.)
2. **BILLS AND NOTES—EXECUTION OF WRITTEN INSTRUMENT—DENIAL UNDER OATH—STATUTE.** Comp. Laws 1907, section 2984, providing that in all actions the allegations of the execution of any written instruments shall be taken as true unless the denial thereof is verified by the affidavit of the party or his attorney, required a specific denial under oath of the execution of the note and mortgage sued on in order to place plaintiff upon proof of their execution. (Page 240.)
3. **PLEADING—ANSWER—VERIFICATION.** Under such provision, the verification of defendant's answer by his attorney of record, to the effect that it was "true to the best of his knowledge, information, and belief," verified no direct or positive denial of the allegations of the complaint. (Page 241.)
4. **APPEAL AND ERROR—REVIEW—APPEAL FROM JUDGMENT ON PLEADINGS—EVIDENCE.** In a suit on a note and to foreclose a mortgage on

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realty, a letter of defendant's counsel, asking an extension of time for payment, though admitted without objection, would be disregarded on appeal from a judgment for plaintiff on the pleadings. (Page 241.)

Appeal from District Court, Third District; *Hon. George F. Goodwin*, Judge.

Action by Mrs. A. J. Brewer against Walter Romney and another.

Judgment for plaintiff on the complaint and answer. Motion for new trial denied. Defendants appeal.

AFFIRMED.

Walter C. Hurd for appellants.

W. R. Hutchinson for respondent.

CORFMAN, J.

Plaintiff brought suit in the district court of Salt Lake county to collect the amount due on a promissory note and to foreclose a mortgage given as security on certain real property therein described. The complaint is in the usual form. Defendants demurred to the complaint, and, upon the overruling of their demurrer, made answer, denying generally each and every allegation of the complaint, and affirmatively alleged that:

"They executed a certain promissory note in favor of said plaintiff, but deny that the same was in form or in substance or legal effect as set out in said complaint, or to the effect therein alleged."

The answer was verified by the attorney for the defendants:

"That he is the attorney for the defendant in the above action, and makes this verification in his behalf for the reason that said defendant is absent from Salt Lake county, where his attorney resides and where this action is pending; that he has read the foregoing answer, knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief."

Plaintiff moved for judgment in her favor against the defendants, upon their answer, "for the reason that said answer is an admission of the liability and claim and demand of plaintiff in said action, and for the further reason that said answer is not verified as required by law, and for the further reason that said answer is a subterfuge and is not made in good faith." Thereafter said motion coming on for hearing, Walter C. Hurd, the attorney for defendants, was called as a witness in behalf of the plaintiff, and a letter written by him to the plaintiff for the defendants was identified, offered, and received in evidence, wherein it was stated:

"I am the attorney for Mr. Walter Romney, against whom you have started foreclosure proceedings on a mortgage executed by him and his wife, which became due last fall. I have had several conversations with Mr. Hutchinson, your attorney, concerning the matter in an endeavor to get an extension of time for the payment of this mortgage for about three months, by which time Mr. Romney will have the money to pay the mortgage in full. * * * Mr. Romney desires me to say that if you will consent to delay proceedings upon the mortgage until April 1st, he will pay the court costs and attorney's fees and pay the mortgage in full by that time. If you will consent to this, it will be a great accommodation to Mr. Romney, as it will save him from paying the additional court costs which would be incurred by forcing the case along, and it will also avoid the necessity of his getting a new mortgage on this property with which to pay off your mortgage, since, as above stated, he will have the money by April 1st with which to pay off your mortgage in full. * * * I trust that you will see fit to agree to delay matters for the short time above requested, especially in view of the fact that you would not be able to procure a judgment any sooner than April 1st, and in consenting to the delay you will save Mr. Romney considerable money. * * *"

The court granted plaintiff's motion, with leave to defendants to amend their answer, which defendants declined to do. Thereafter plaintiff offered proof under the allegations of her complaint, and the court made its findings of fact, conclusions

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of law, and rendered judgment for the plaintiff against the defendants, as prayed for in plaintiff's complaint. Motion for a new trial was made and denied. Defendants appeal.

Several errors are assigned by defendants on appeal, all of which merge with the one question, Was the trial court justified in granting the plaintiff's motion for a judgment on the pleadings? Subdivision 1, section 2968, c. 12, Comp.

Laws Utah 197, provides that an answer must contain: 1

"A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer."

Counsel for defendants very earnestly argues that under the foregoing provisions of the statute defendants' answer, denying generally all the allegations of the complaint, puts in issue and sufficiently states a defense to all the material allegations of the plaintiff's complaint, citing as his authority in support of his contention, among others, *Morrison v. O'Reilly*, 2 Utah, 166, *Reich v. Rebellion S. M. Co.*, 3 Utah, 257, 2 Pac. 703, and *Haslam v. Haslam*, 19 Utah, 5, 56 Pac. 243. We have carefully reviewed the foregoing cases and, in our opinion, they clearly fail to support the position taken by counsel that a general denial is sufficient to put in issue the formal allegations of a complaint in a suit upon a promissory note and mortgage when in form as presented here by the plaintiff's complaint. In the *Reich Case*, supra, this court decided without comment as to the sufficiency of *specific*, not general denials, "*that material issues were raised by the answers, and hence he (plaintiff) is not entitled to judgment on the pleadings.*" (Italics ours.) In the *Morrison Case*, supra, this court held:

"An inspection of the answer shows very clearly that most, if not all, the allegations of the complaint are *specifically* denied. The mere form of the denials is not material if they meet and traverse the allegations in the complaint." (Italics ours.)

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Again, in the Haslam Case, *supra*, which was an action for trespass and damages, this court said:

“The answer, however, by way of cross-complaint, in accordance with the prayer of the complaint, *sets out in minute detail* a title in defendant, to the premises in dispute, which if established by proof would defeat the plaintiff’s right to the relief prayed for in the complaint, or to any relief whatever, and put the alleged title and right of possession of plaintiff in issue as effectually as any specific denial could have done.” (*Italics ours.*)

It is provided by section 2984, c. 15, Comp. Laws Utah 1907, that:

“In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be 2 taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney.”

So far as the writer of this opinion has been able to ascertain after careful search, the precise question has never been passed on by this court as to whether a general denial shall be deemed sufficient answer to a complaint in an action upon a note and mortgage pleaded as in the case at bar. However, it has been expressly held in some jurisdictions, under statutes very similar to the Utah statute in question, that a general denial does not present any issue to be tried. *Banks v. McCosker*, 82 Md. 518, 34 Atl. 539, 51 Am. St. Rep. 478; *Bausman v. Credit Guarantee Co.*, 47 Minn. 377, 50 N. W. 496.

We think a fair interpretation of the Utah statute, last above quoted, requires a specific denial under oath of the execution of the note and mortgage sued upon in this action if the plaintiff is to be placed upon proof of their execution, and that the defendants’ general denial, as to execution, raises no issue, especially when qualified with the defendant’s admission “that they executed a certain promissory note in favor of said plaintiff.”

Let it be understood that we are not here deciding that under the Utah statute above quoted a general verified denial in any case would not raise an issue nor put the plaintiff on

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proof of the allegations of his complaint in an action upon contract; but we do decide that (assuming that in the case at bar the answer of the defendants was duly verified) upon the introduction without objection of the defendants' letter to plaintiff, virtually admitting the plaintiff's demands to be just and due her, the trial court was amply justified in awarding plaintiff judgment as prayed for in her complaint. Any other course would not subserve the interests of justice, and would only tend to encourage sham and frivolous answers.

Then again, the verification of defendants' answer in their behalf, as made by their attorney of record, "that the same is true to the best of his knowledge, information, and belief," verifies no direct or positive denial, and makes manifest an intent to evade the responsibility of denying 3
under oath the truthfulness of the allegations of the plaintiff's complaint.

Commercial interests, and business good faith as well, in actions upon this class of contracts, require that if there be defenses they should be specifically stated, and with common certainty. The record in the case at bar indicates no defense of merit, and we are convinced that a reversal of the judgment of the district court would not avail the defendants of the opportunity of making any legal defense or securing for themselves any modification of the judgment as it now stands.

We cannot conceive wherein the letter written by counsel for defendants was competent or admissible on the hearing of plaintiff's motion for judgment on the pleadings. While it was received in evidence without objection, and is a part of the record on appeal to this court, in our opinion it 4
should be, and is, by this court, disregarded.

It is ordered that the judgment be affirmed, with costs.

MCCARTY, THURMAN, and GIDEON, JJ., concur.

FRICK, C. J.

I concur. In view of the importance of the question of procedure that is involved in the foregoing decision I desire to add a few words to what is said by my associate, Mr. Justice CORFMAN.

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In my opinion the answer in this case was wholly insufficient to successfully withstand the motion for judgment on the pleadings. It presented no material issue for the reason that in view of the provisions of Comp. Laws, 1907, section 2984, the execution of both the note and the mortgage sued on were admitted and hence none of the material allegations contained in the complaint were denied. That section, in my judgment, means just what it says, namely, that the things therein enumerated must be specifically denied under oath, or, for the purposes of the action, they will be deemed admitted. A mere general denial, whether verified or not, under our Code, as a matter of course, puts in issue all the material allegations of the complaint except those pertaining to the things enumerated in section 2984. If, however, the pleader intends to put in issue any one or more of the matters in that section enumerated he must do so by specifically referring to and denying the thing therein enumerated which he intends to deny and which he intends to put in issue. If that is not the purpose of the statute then I cannot conceive that it has any purpose. Moreover, the statute was adopted so that the plaintiff might be put on notice whether he is required to produce evidence in support of any one or more, or all, of the matters mentioned in section 2984. The statute was, therefore, adopted in the interest of the due administration of justice, not only in that regard, but also in respect of preventing perjury on the part of a too willing defendant. If, by a general denial, all the things enumerated in section 2984 are in fact denied, then it will often happen that a defendant in fact will deny that which he would not deny if his attention were directed to the specific thing he is called on to deny as a matter of form. Almost any layman will, when requested by his attorney, verify a general denial, when, if he were requested to make oath to the specific fact that he did not sign the instrument sued on, or that a particular person did not indorse the same, or that a particular person was not appointed executor or administrator, or any of the other things enumerated in the statute, he would not deny the fact under oath. If, therefore, a general denial is held sufficient to put in issue all

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of the things mentioned in the statute the person who falsely verifies such a denial may, to say the least, be subject to prosecution for perjury. In my judgment, therefore, the manifest intention and purpose of the statute is to require a specific denial of all the things that are specially enumerated therein, and unless so denied under oath all of them will be deemed admitted for the purposes of the action. The judgment should, therefore, be affirmed.

PASSOW & SONS v. WETHERBEE et al.

No. 3047. Decided August 20, 1917. (167 Pac. 350.)

1. CORPORATIONS—INSOLVENT CORPORATION—TRUST FUND THEORY—APPLICABILITY. The doctrine that the assets of an insolvent corporation constitute a trust fund in equity for the payment of creditors pro rata and without preference is inapplicable in this state, without statute authorizing its application.¹ (Page 248.)
2. CORPORATIONS—DEFUNCT CORPORATION—PREFERENCE OF CREDITORS. Where a corporation has forfeited its charter for nonpayment of the annual corporation tax under Laws 1909, c. 106, section 5, relating to forfeiture, and providing that in case of forfeiture all the assets of the defaulting corporation shall be held in trust by the directors, and the same proceedings had as are applicable to insolvent corporations, it may in good faith in winding up its affairs make preferences among its creditors so long as not interfered with in a proper equitable proceeding to subject its property to payment of creditors. (Page 249.)
3. CORPORATIONS—POWERS OF PRESIDENT—NOTES AND MORTGAGES. Where the president who was also the general manager of the corporation was authorized under its by-laws to transact its general business, his power to execute a note and mortgage and the legality of his acts will not be questioned, especially where he acts in good faith and there is no fraud.² (Page 250.)
4. CORPORATIONS—CREDITORS' SUITS. The plaintiff could not, without offering to restore the money paid, invoke the aid of equity to have declared illegal the foreclosure of a mortgage of a defunct corporation assigned to a creditor who paid money therefor for the use of

¹*Weyeth H. & M. Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110, 47 Pac. 604; *Colorado Fuel & Iron Co. v. Hardware Co.*, 16 Utah, 11, 50 Pac. 628; *Burnham et al. v. McCornick*, 18 Utah, 42, 55 Pac. 77; *Nat'l Bank v. Scott*, 18 Utah, 400, 55 Pac. 374.

²*McCarrick v. Lenox Mg. Co.*, — Utah, —, 164 Pac. 478.

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the creditors of the corporation, especially where the creditor was an actual loser by the transaction. (Page 250.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by Passow & Sons against W. L. Wetherbee and others.

Judgment for plaintiff against defendant named. Defendant appeals.

AFFIRMED with costs.

Hurd & Hurd for appellant.

R. W. Young & Son and *Harry J. Robinson* for respondents.

CORFMAN, J.

This was an action brought by plaintiff in the district court of Salt Lake county to determine the rights of a creditor of a defunct corporation. The complaint, in substance, alleges the corporate existence of the plaintiff and the defendant Utah State National Bank, hereinafter designated bank; that the defendant W. L. Wetherbee Company, hereinafter called company, was organized as a corporation, but on the 3d day of April, 1911, its charter was forfeited by reason of nonpayment of the annual corporation tax; that thereupon it ceased to have any power or authority to continue business, and that it thereupon became and is still insolvent; that on the 25th day of November, 1913, the plaintiff recovered a judgment against the defendant company for the sum of \$669.60 interest and costs; that thereafter, on or about October 3, 1914, an execution was issued on the judgment and the sum of \$50 obtained thereon and applied as part payment of the judgment; that the balance of plaintiff's judgment remains unsatisfied; that the defendant W. L. Wetherbee was the general manager and, as such, had sole charge and control of the property and assets of the defendant W. L. Wetherbee Company; that the assets consisted of personal property of various kinds, including a stock in trade; that the defendant W. L.

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Wetherbee on October 2, 1912, assumed, without legal authority, and with the purpose of hindering and delaying creditors, particularly the plaintiff, to mortgage, substantially, all the assets of the defendant W. L. Wetherbee Company to the defendant bank, and thereafter, on November 28, 1914, the bank obtained a judgment and decree of foreclosure of the mortgage, the mortgaged property was sold, bought in by the bank and resold by it to the defendant W. L. Wetherbee, who claims to be the owner thereof to the exclusion of the plaintiff and other creditors; that the foreclosure and sale by the bank was illegal and void, and in fraud of the rights of the plaintiff and other creditors of the defendant company. Plaintiff prayed for an accounting of the assets of the defendant company and for judgment therefor against all the defendants, receivership, attorneys' fees and costs of suit in behalf of itself and all other creditors coming in and joining in the action, and for general relief.

The separate answer of the defendant bank admits its corporate existence and the incorporation of the W. L. Wetherbee Company, and affirmatively alleges that the mortgage given by the company was in the exercise of its lawful powers and for a valuable consideration; that the mortgage was legally foreclosed, the property purchased by the bank at the foreclosure sale and subsequently resold to the defendant W. L. Wetherbee, on a title retaining note; that Wetherbee failed to pay for the same; that the property was recovered from Wetherbee and portions thereof resold. The other allegations of the complaint are denied. Plaintiff, in reply, denied all the affirmative allegations of the answer.

Briefly stated, the facts proven at the trial were as follows: The defendant company was incorporated under the laws of Utah in January, 1910. Failing to pay the annual corporation tax its charter was declared forfeited April 3, 1911, pursuant to statute. The defendant W. L. Wetherbee was its president and general manager authorized, as such, under its by-laws, to transact the general business affairs of the company. April 12, 1911, one day after the charter of the company had been forfeited, a meeting of creditors of the company was held and

it was arranged that the company should go into liquidation. Time for payment of the company debts was extended and a note and chattel mortgage given for \$6,000 on all the assets to the Utah Association of Credit Men, as trustee for the creditors. Payments were made by the company to the Utah Association of Credit Men reducing the mortgaged indebtedness to \$3,390.70, when the note and mortgage was assigned by the Utah Association of Credit Men to the defendant bank for a consideration of \$2,048.28. Subsequently this mortgage was renewed by the company with the bank by the giving of a new note and mortgage, under which foreclosure proceedings were had and the mortgaged property purchased by the bank at foreclosure sale. Thereafter the bank sold the property to the defendant W. L. Wetherbee, on a title retaining note which was not paid, whereupon the property was repossessed by the bank and by it sold to a third party, the bank sustaining some financial loss in the transactions. The indebtedness of the company with the plaintiff was contracted for goods, wares, and merchandise between October 1, and November 30, 1910, for which a judgment was had and obtained against the company in November, 1913. In October, 1914, execution was issued and \$50 was recovered by the sheriff of Salt Lake county and applied on the plaintiff's judgment. The evidence also shows that the plaintiff did not take any part in the previous transactions of the company with its creditors, the Utah Association of Credit Men and the bank. Upon trial to the court a money judgment was rendered in plaintiff's favor against the defendant W. L. Wetherbee, as prayed for, and denied as to the defendant bank. Plaintiff appeals.

Numerous errors are assigned. However, counsel for plaintiff, in his brief, presents but one question for determination by this court, and, as said by him:

"The sole question presented upon this appeal is whether or not defendant W. L. Wetherbee Company, after having become insolvent, and after the forfeiture of its franchise, could assign or otherwise convey its property to a single creditor, either for itself or for the benefit of itself and other creditors, to the exclusion of the rights of the plaintiff and the

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other creditors to participate in the distribution of the assets of the said involvent and defunct corporation."

This question presents the effect of Laws Utah 1909, c. 106, section 5, relating to the forfeiture of the charter of such defaulting corporation and winding up the business thereof. After providing in said chapter for the method of the forfeiture of defaulting corporations it is, by section 5 thereof, further provided:

"The Governor, for at least ten days prior to the first Monday in April following [March], shall publish such list in at least two daily papers of general circulation within this state, and shall append to such list and publish therewith his proclamation to the effect that unless the license tax owing by such corporation, together with the penalty and all the costs, shall be paid to the secretary of state on or before noon on the first Monday in April following, such defaulting corporation shall forfeit the amount of the tax and the penalty and costs to the state of Utah, and shall also forfeit its right to carry on business within said state. * * * In case of forfeiture of the charter and of the right to transact business thereunder, all the property and assets of the defaulting domestic corporations shall be held in trust by the directors of such corporation as in case of insolvent corporations, and the same proceeding may be had with respect thereto as is applicable to insolvent corporations. Any person interested may institute such proceedings at any time after a forfeiture has been declared as herein provided, but in case the Governor shall reinstate the charter the proceedings shall at once be dismissed and all property restored to the officers of the corporation. In case the assets are distributed they shall be applied as follows: First, to the payment of the license tax, penalties and costs due to the state; second, to the creditors of the corporation; and, third, any balance remaining shall be distributed among the stockholders in accordance with the amount of stock held by each."

If we understand the contention of plaintiff, it is that, upon the forfeiture of the company charter for noncompliance with the foregoing statute, all assets of the company thereby under

the statute, were to be held in trust by the directors of the company to be disposed of and the proceeds applied 1
ratably among all the stockholders without preference;
and the giving of the chattel mortgage by the company to the Utah Association of Credit Men as trustee for the benefit of certain creditors was a preference to the exclusion of plaintiff and other creditors similarly situated, and therefore absolutely void; and that the bank, through the subsequent assignment of this mortgage, its renewal and the foreclosure proceedings following, acquired no rights to the company property and assets, and for which the bank must account to plaintiff as a creditor of the company in common with all other creditors. In making this contention counsel invokes what is known as the "trust fund" or American doctrine; that the assets of an insolvent corporation—and it is to be noted that under the foregoing statute in case of forfeiture of a charter the property and assets of the defaulting corporation are to be held in trust by the directors as in case of insolvent corporations and the same proceedings may be had as are applicable to insolvent corporations—constitute a trust fund in equity for the payment of all the creditors pro rata and without preference. This contention of counsel, if tenable, must be sustained under the particular statute in question, for the "trust fund" doctrine in this state has been so repeatedly repudiated by the decisions of this court that it may now be regarded as well-settled law that this doctrine will not apply unaided by express statutory enactment authorizing its application. *Weyeth H. & M. Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110, 47 Pac. 604; *Colorado Fuel & Iron Co. v. Hardware Co.*, 16 Utah 11, 50 Pac. 628; *Burnham et al. v. McCornick*, 18 Utah, 42, 55 Pac. 77; *National Bank v. Scott*, 18 Utah, 400, 55 Pac. 374. In the case of *Weyeth H. & M. Co. v. James-Spencer-Bateman Co.* supra, it is said:

"Upon careful examination of adjudged cases, as well as upon principle and analogy, and in the absence of insolvent laws and statutory restrictions, we feel ourselves bound to hold that a corporation, in this state, has the same power to prefer creditors, by deed of assignment or otherwise, as a private debtor has, so long as its assets have not been taken into possession by a court of equity, in a proper proceeding, at the in-

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stance of a proper party. The rule in the case of a corporation, the same as in that of an individual, is impregnable, except by legislative enactment."

The statute in question reads:

"In case of forfeiture of the charter and of the right to transact business thereunder, all the property and assets of the defaulting domestic corporations shall be held in trust by the directors of such corporations as in case of insolvent corporations, *and the same proceeding may be had with respect thereto as is applicable to insolvent corporations.*" (Italics ours.)

Clearly no new rule of procedure, as contended for by plaintiff, is, by this statute, expressly prescribed; nor can it be reasonably implied from the language of the statute that the affairs of a forfeiting or insolvent corporation are to be administered by its directors or governing officers in any but the usual and lawful way recognized at the time of its enactment. So, too, it is equally apparent from the reading of the statute that the right of the creditors, at any time after forfeiture, to go into a court of equity and have the corporate assets taken possession of and administered upon impartially for the benefit of all creditors remains unimpaired. To hold, as contended by plaintiff, that when a corporation has forfeited its charter, or has become insolvent and has ceased to do business, its property and assets constitute a trust fund to be administered by its board of directors, as trustees, for the equal benefit of all of its creditors without right to make preference by deed or assignment or otherwise would be to repudiate the repeated former rulings of this court and adopt the "trust fund" theory or doctrine, and give the statute invoked by plaintiff a meaning clearly repugnant to its express provision that "the same proceedings may be had with respect thereto as is applicable to insolvent corporations."

We are therefore of the opinion that the only fair interpretation which can be placed on the statute in question is, that where a corporation has, under its provisions, 2
forfeited its charter, in the winding up of its affairs
and in the disposition of its assets, it may make preference,

by assignment or otherwise, among some of its creditors to the exclusion of others, so long as not interfered with in a proper equitable proceeding for the purpose of subjecting its property and assets to the possession of a court of equity to be administered upon equally and impartially among all of its creditors. It is not contended that it has been shown that the taking of the note and mortgage of the company by the Utah Association of Credit Men was with any fraudulent intent, or otherwise than to apply any and all payments received to the legitimate purpose of paying the debts of the company owing to its creditors. Neither is it contended that the purchase of the note and mortgage in question by the bank and the assignment thereof to it were otherwise than for a good and sufficient consideration and in absolute good faith. The bank then had the right to have renewal of the company obligation to it, and to have the mortgaged property subjected to foreclosure proceedings for the recovery of the amount thus justly due it.

Plaintiff makes some further contention that W. L. Wetherbee, as president of the company, acted without sufficient authority in the execution of the note and mortgage to the Utah Association of Credit Men, and also in making renewal thereof to the defendant bank. While it is 3 true that, ordinarily, the president of a corporation, as such, has no inherent power to execute contracts in general without express authority of its board of directors yet when, as here, the president is also the general manager of the company authorized to act under its by-laws, and has been long accustomed to transact all the corporate business, his power and the legality of his acts may not be questioned, especially when exercised and performed in good faith and in the absence of fraud. *Oakes v. C. W. Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; *McCarrick v. Lenox Min. Co.*, 49 Utah 353, 164 Pac. 478.

There is another reason to be assigned, we think, why the plaintiff in this action is precluded from recovering a judgment against the defendant bank. It is conclusively shown by the record here that the bank, in acquiring the property and assets of the defendant company, acted 4

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in perfect good faith and paid full value for all that it received. The plaintiff in bringing this action invokes the aid of equity without offering to do equity by restoring to the defendant bank the money paid to the Utah Association of Credit Men, as trustee, for the use and benefit of the creditors of the defendant company. This it may not do, especially when, as here, it is shown that the defendant bank reaped no profit, but, to the contrary, was an actual loser in the transaction.

It is ordered that the judgment of the district court be affirmed. Costs to the defendant Utah State National Bank.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

CAIN v. STEWART et ux.

No. 2972. Decided August 20, 1917. (167 Pac. 265.)

APPEAL AND ERROR—PRESUMPTIONS—FAVORING TRIAL COURT—SUPPORT OF FINDINGS BY TESTIMONY. In the absence of any testimony, if the findings are supported by the pleadings, the Supreme Court assumes that there was testimony to support the trial court's findings.

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by Addison Cain against S. R. Stewart and Francis M. Stewart, his wife.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

E. G. Palmer for appellant.

Addison Cain, in pro. per.

GIDEON, J.

This is a second appeal in this action. Reference is made to the former opinion of this court, announced October 6, 1915, for a statement of the facts. *Cain v. Stewart*, 47 Utah, 160, 152 Pac. 465.

The judgment on that appeal was reversed, being excessive, and was remanded to the district court, with directions to re-examine the evidence, calculate the amount due in accordance with the rule of partial payments, make findings of fact and conclusions of law, and to enter judgment. That the district court did, and entered judgment on the 11th day of January, 1916. This appeal is from that judgment and is upon the judgment roll.

The testimony is not before this court, either on the original appeal or on this appeal, and we have no way of determining from the record as to whether the amount found by the district court is supported by the testimony. In the absence of any testimony, when the findings are supported by the pleadings, we assume that there was testimony to support the findings of the trial court. Under the state of the record all that this court can do is to affirm the judgment.

Complaint is made that the property described in the complaint had been sold under the former judgment, and the premises passed into the possession of the plaintiff, and that the district court, in entering the second judgment, should have taken into account and allowed the defendants the reasonable rental value of the premises during the time they were occupied by the plaintiff. That the district court was not authorized or instructed to do. Under the mandate of this court that court was required to re-examine the evidence and ascertain the proper amount due and enter judgment for that amount. It might be suggested, however, that if the plaintiff occupied premises belonging to the defendants prior to his legal right so to do, plaintiff would be liable to the owners for the reasonable rental or use of the premises during such time under proceedings to recover such rental.

Under the state of the record before this court we are satisfied that it is our duty to affirm the judgment of the district court.

Such is the order.

FRICK, C. J., and CORFMAN, McCARTY, and THURMAN, JJ., concur.

Appeal from Millard County, Fifth District

NORTON v. McININCH et al.

No. 2990. Decided August 9, 1917. Rehearing denied August 21, 1917.
(166 Pac. 984.)

ATTORNEY AND CLIENT—RIGHT TO ATTORNEYS' LIEN—WAIVER OF LIEN.

Where, under Comp. Laws, 1907, section 135, an attorney is given a lien upon his client's cause of action which attaches to the verdict, decision or judgment rendered in his client's favor, and where the attorney has obtained judgment in favor of his client, but after judgment authorizes the judgment debtor to settle for the amount of the judgment with the attorney's client, and such a settlement is made between the judgment debtor and the client in good faith and with the attorney's consent, the attorney waives his right to a lien, and the trial court committed no error in limiting the attorney to a personal judgment against his client for the services rendered.

Appeal from District Court, Fifth District; *Hon. Joshua Greenwood*, Judge.

Action by Charles E. Norton against M. S. McIninch.

Judgment for plaintiff in part. He appeals.

C. E. Norton in pro. per.

Jas. A. Melville and *Story & Steigmeyer* for respondents.

CORFMAN, J.

Plaintiff commenced this action to recover fees and for the enforcement of an attorney's lien under the provisions of section 135, Comp. Laws 1907. The pleadings are voluminous, and it is impracticable to set forth here more than the substance of the material allegations necessary for the determination of the question involved on this appeal.

The complaint states that the plaintiff is an attorney and counselor duly qualified under the laws of Utah; that the defendant M. S. McIninch, during the times mentioned in the complaint, was the principal and agent of the seventy-nine other defendants; that the said seventy-nine defendants were and now are holders of contracts with the defendants Oasis Land & Irrigation Company, Delta Land & Water Company,

and Delta Canal Company, under the provisions of chapter 2, title 75, Comp. Laws Utah 1907, as amended, for lands and water rights in Millard County, Utah; that between May 1, 1910, and April 15, 1911, plaintiff performed services for the seventy-nine defendants in prosecuting certain suits, in drawing various instruments, in counseling and advising them and in attending to business in connection with their grievances and claims against the defendant Oasis Land & Irrigation Company, and in the prosecution of an action for damages in the Fifth district court wherein the defendant M. S. McIninch, in his own behalf and in behalf of the other defendants, sued to recover damages on their contracts with said defendant Oasis Land & Irrigation Company, in the sum of \$111,300; that the defendant McIninch was the assignee of the other defendants to save a multiplicity of suits; that each of the defendants had an interest therein; that subject-matters of the individual contracts were liquidated and applied on the contracts for the use and benefit of the several defendants; that the services of the plaintiff were reasonably worth \$5,000, no part of which has been paid, except \$100; that on the 11th day of April, 1911, plaintiff duly filed his attorney's claim of lien in the office of the county recorder of Millard County; that defendants Delta Land & Water Company and Delta Canal Company are corporations organized for the purpose of taking over the affairs of the defendant Oasis Land & Irrigation Company, under chapter 2, title 75, Comp. Laws Utah 1907, as amended, and that the judgment has been or is about to be transferred to the other defendants; that plaintiff has no speedy and adequate remedy at law, and that, unless restrained, the defendant corporation will transfer and alienate and destroy plaintiff's lien upon the judgment and water contracts, to his damage in the sum of \$4,900; that the contracts referred to were between the defendant Oasis Land & Irrigation Company and the state board of land commissioners of Utah, wherein the former bound itself to construct a dam and system of canals for the irrigation of certain lands under provisions of Utah statutes and an act of Congress known as the "Carey Act," U. S. Comp. St. 1916 sec. 4685.

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Plaintiff prayed judgment for \$4,900, and that the same be adjudged to be a lien against the judgment rendered on the several causes set forth in the former suit; that the water rights and contracts of the several defendants be charged therewith, and that the same be sold and the proceeds applied to the plaintiff's lien; that meanwhile transfer of the former judgment be restrained by the order of the court; and for general relief, and costs of suit.

The defendant's contract holders severally answered the complaint, admitting the employment of the defendant McIninch by them individually, and not jointly, with other defendants, to render some legal services, and that by the terms of the employment McIninch was to adjust their several claims against the defendant Oasis Land & Irrigation Company for a specified sum, which they have paid the defendant McIninch, in full for all services rendered; that they held water contracts with the defendant Oasis Land & Irrigation Company, which they assigned to McIninch for a valuable consideration, and that McIninch brought suit on the claim in his own name, and that they received credits on their water contracts as a consideration for the assignment to McIninch; that they have not paid the plaintiff for his alleged services. The several answers of the contract holders further admit the taking over by the defendants Delta Land & Water Company and the Delta Canal Company of their contracts with the Oasis Land & Irrigation Company and the state board of land commissioners for the construction of an irrigation system for reclaiming and irrigating certain lands in Millard County, and deny generally all the other allegations of the complaint not admitted or modified by their respective answers.

The separate answers of the defendants Delta Land & Water Company and the Delta Canal Company deny all material allegations of the complaint, except they admit their corporate existence, and that they were organized for the purpose, inter alia, of acquiring all of the property rights and interests of the defendant Oasis Land & Irrigation Company, and the contracts entered into between the defendants contract holders, under the "Carey Act" and Utah statutes, and that the lands to which the water rights are appurtenant are

situated in Millard County. The answers of these defendants further affirmatively allege that the plaintiff acted as attorney for the defendant McIninch in his suit upon the several causes of actions against the defendant Oasis Land & Irrigation Company, and that it was by and with the consent of the plaintiff that the judgment in said suit was made and entered of record, wherein the court found, inter alia, that all of the damages sustained by the defendants, assignors of McIninch, had been fully paid, liquidated, and discharged by credits theretofore made and given by the Oasis Land & Irrigation Company upon the contracts mentioned in plaintiff's complaint in the said action, and that it was therein adjudged and decreed that the plaintiff, McIninch, recover nothing of or from the Oasis Land & Irrigation Company, and that the said judgment remained unmodified and in full force and effect, and that by reason of plaintiff's stipulation, wherein he approved of the said judgment, plaintiff had waived all claim and demand, as well as any and all liens which he might have had upon the judgment thus entered, as to all the defendants, and as to any and all matters mentioned in his complaint in this action, and that plaintiff is estopped thereby from maintaining this action. Copies of the findings of fact, conclusions of law, and judgment in said action were attached and made exhibits and part of the answer.

Plaintiff made reply to the foregoing answers, fully pleaded the stipulation, the awards made by arbitrators to the several defendants contract holders, and, in part, the contract between the Oasis Land & Irrigation Company, Delta Land & Water Company, and the state of Utah, and further alleged that during all the times mentioned the defendant Oasis Land & Irrigation Company was insolvent; that it had not deposited with the state of Utah any undertaking, as provided by law, and that the plaintiff was unable to collect a judgment or to enforce the terms of the contracts against it, and, in order to protect the land and water contracts for the defendants contract holders at their special instance and request, the plaintiff agreed to the taking over by the Delta Land & Water Company of all the assets of the defendant Oasis Land & Irrigation Company, and in consideration thereof the de-

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defendant Delta Land & Water Company agreed, in writing, under section 2467, Comp. Laws Utah 1907, to answer for the debt, default, or miscarriage of the defendant Oasis Land & Irrigation Company, and thereafter did take over said assets and liabilities of the Oasis Land & Irrigation Company, and thereafter, to save to each of the defendants contract holders the awards for damages against the Oasis Land & Irrigation Company, plaintiff consented to and permitted the said transfer of the said awards upon the contracts and the dismissal of their action; that the defendant Delta Land & Water Company negotiated, through the plaintiff, the sale and transfer of the assets of the Oasis Land & Irrigation Company, including the contracts of the defendants contract holders, and caused the said suit and judgment to be settled as provided by the stipulation, and caused to be deposited the said land and water contracts with banking companies in order to secure money with which to complete the irrigation system and furnish water under it; that at all times the defendants by their conduct induced the plaintiff to believe in the existence of the facts as stated in plaintiff's complaint and reply herein; and that by reason of this, and relying thereon, plaintiff acted to his prejudice in the sum of \$4,900, and in good conscience defendants are estopped by reason of their conduct and receiving said benefits from denying plaintiff's claims and demands.

The evidence adduced at the trial, in brief, shows: That in an action brought and filed August 1, 1910, by the defendant M. S. McNinch, as plaintiff, against the defendant Oasis Land & Irrigation Company, seventy-six causes of action were stated to recover damages aggregating \$111,300; that it was later stipulated by the parties to said action that the claims for damages should be submitted to three arbitrators, and that they should file their report with the clerk of the court, and that the said clerk—

“shall thereupon enter a judgment in favor of the plaintiff and against the defendant for the amount of such awards. Said judgment, however, shall not be a lien upon any property of the defendant, but shall be immediately satisfied by the plaintiff in consideration of the defendant issuing to the

plaintiff its certified statements of credits to be made upon the contract of each person claiming damages, and the *plaintiff shall immediately upon such judgment being entered satisfy the same* in consideration of the credits being made as aforesaid, and thereafter the defendant shall make such credits upon the several water contracts held by the said plaintiff and several assignors named in said complaint, as the plaintiff may direct, and not otherwise. * * * That all maturing payments in each contract of the parties whose names appear in the several causes of action in said complaint shall be extended one year from the date of the maturity of each payment to each of the persons named in the said causes of action, *and it is especially stipulated and agreed that all claims or demands or causes of action on the part of each and every one of the said specified parties named in the several causes of action accruing up to the time of the entry of such judgment have been and are liquidated and discharged. That the said action shall be dismissed upon the entry of such judgment and the giving of such credits* and making such extensions of time of payments as aforesaid.” (Italics ours.)

This stipulation was signed by the plaintiff personally, by his attorney, the plaintiff here, and the attorney for the defendant. The award was made by the arbitrators and duly filed in said cause. The court thereupon accordingly made its findings of fact and conclusions of law, and entered judgment, viz.:

“In consideration of the premises it is hereby ordered, adjudged, and decreed that the plaintiff recover nothing from the defendant, that the defendant go hence without day, and that each of the parties hereto pay his own costs in this action.”

On the 14th day of April, 1911, plaintiff filed his notice of claim of attorney's lien by virtue of the provisions of section 135, Comp. Laws Utah 1907, and amendments thereto, in the office of the county recorder of Millard County, and on the 1st day of February, 1916, caused the same to be recorded in said office, setting forth, among other things, that he “hereby claims and intends to claim and hold, and does have and hold,

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a lien upon those certain lands and premises, water and water rights, stipulations, agreements, and contracts, claims for damages and credits, actions, and rights of action, waivers and extensions, causes and choses in action owned and reputed to be owned by the hereinafter named settlers, * * * to secure the payment of the sum of ten thousand dollars owing to * * * Chas. E. Norton, as attorney and counselor at law and solicitor in chancery, for legal services performed and furnished in and in connection with the grievances and claims of settlers against the Oasis Land & Irrigation Company, * * * and for legal services performed and furnished in connection with and as attorney and counselor at law in a certain action for damages and other special and general relief in the district court of the Fifth judicial district, in and for Millard County, * * * entitled '*M. S. McIninch, Plaintiff, v. Oasis Land & Irrigation Company, Defendant,*' * * *'' and naming therein 248 "settlers," or reputed landholders, with a description of their lands, acreage, and number of their contracts. Numerous other exhibits, consisting of letters of the defendant M. S. McIninch to the plaintiff herein, and letters of other defendants to McIninch, the contract with the state of Utah, and water contracts, were received and admitted in evidence; but their contents and purport, not being material or necessary in the determination of the appeal to this court, are omitted here.

The plaintiff, in his own behalf, testified that he was not employed directly by any of the defendants, other than the defendant McIninch, and that he was not seeking a money judgment against any of the defendants, except McIninch; that he made the stipulation for the judgment rendered in the case of *M. S. McIninch, Plaintiff, v. Oasis Land & Irrigation Company, Defendant*. At the conclusion of the testimony the trial court rendered judgment:

"That the complaint as against all of the defendants, with the exception of M. S. McIninch, should be dismissed, and that a judgment for the amount claimed in the complaint be given in favor of the plaintiff, and against the defendant

M. S. McIninch, for the sum prayed for; and it is so adjudged, ordered, and decreed.”

Plaintiff appeals and assigns as error:

“(1) That the decision is against the law in this: Section 135, Compiled Laws Utah 1907, gave him a lien upon the seventy-six causes of action set forth in the complaint in a case in the above-entitled court wherein M. S. McIninch was plaintiff and the Oasis Land & Irrigation Company was defendant, and that from the commencement of that action, in July, 1910, he had a good and valid lien upon his client's causes of action, which attaches to the stipulated judgment, report of the arbitrators, and the proceeds thereof, in whomsoever hands they have come, and is not affected by any settlement between the parties before or after judgment, and the court erred in refusing to enforce that lien against all of the defendants.

“(2) That the decision is contrary to the evidence in this: The records and files in that case (*McIninch v. Oasis Land & Irrigation Company*) and the records and files in this case, together with the 140 exhibits offered in evidence, affirmatively show that the plaintiff is entitled to equitable relief against all of the defendants for the enforcement of his lien and the collection of reasonable attorney fees for services rendered for all defendants.

“(3) That the court failed to do equity to plaintiff, and failed to exercise its equity jurisdiction in this case, by permitting the defendants to retain the full benefits of said litigation, as shown by the record in this case.”

Section 135, Comp. Laws Utah 1907, provides:

“The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whomsoever hands they may come;

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and cannot be affected by any settlement between the parties before or after judgment."

Under the foregoing statute the plaintiff contends that for services rendered he is entitled to recover a judgment for \$4,900, and that the same be adjudged a lien upon the seventy-six causes of action set forth in the former action or proceeding of the defendant *M. S. McIninch, Plaintiff*, v. *Oasis Land & Irrigation Company*, and also all the matters and property rights involved therein.

We have set forth herein, substantially, the facts alleged in plaintiff's complaint and the testimony adduced in his behalf in the trial of this cause, and it is inconceivable to our minds upon what theory the plaintiff could, with any degree of consistency, have expected the trial court to award him the relief prayed for in his complaint in this action. Some degree of sanctity must be accorded to the proceedings of any court; and to wholly disregard the express stipulations, judgment, and decree made and entered, wherein the plaintiff so actively participated in all the proceedings, as did the plaintiff herein, in the cause wherein he now seeks to have held for naught, in order that he may be enabled to maintain a lien for services alleged to have been rendered by him as an attorney and officer of the courts, would be no less than declaring all court and judicial procedure farcical and the judgments of the courts untrustworthy and wholly undependable. That the plaintiff has expressly stipulated and waived all rights to a lien under the provisions of the statute he here invokes is too apparent to admit of any discussion; and under the law, and in the interest of common justice, to our minds, the trial court was amply justified in denying the relief prayed for, and in entering the judgment of which plaintiff so bitterly complains.

Such rights as the plaintiff may have had to a lien under the provisions of the statute and the authorities he seeks to have aid him in the enforcement of his demands for compensation for such services as he may have rendered for defendants were, by his own acts and conduct, in permitting, stipulating to, and directing the procedure of his client's cause to the final judgment rendered by the court, wholly

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waived, and he is now estopped and precluded from disturbing the existing rights of the parties, defendants here, under said judgment. R. C. L. section 166; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649; *Clare v. Lockhard*, 122 N. Y. 263, 25 N. E. 391, 9 L. R. A. 547; Jones, Liens (3d Ed.), section 231.

The judgment of the district court is affirmed, with costs.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

ROPER v. CROSIER et al.

No. 2889. Decided June 28, 1917. (167 Pac. 808.)

1. **VENDOR AND PURCHASER—RECOVERY OF MONEY PAID—FRAUD.** In an action by plaintiff to recover for amounts paid and land conveyed in satisfaction of a contract for the purchase of orchard land, evidence held insufficient to show that certain defendants, though they participated in the organization of the corporation, which owned no such land and had small assets, were parties to the fraud. (Page 268.)
2. **VENDOR AND PURCHASER—RECOVERY OF MONEY PAID—FRAUD.** Appellant and another organized a corporation having a capital stock of \$1,000, which was practically all held by appellant and one associate. They proceeded to advertise that the corporation was the owner of valuable orchard lands, and offered them to the public. Appellant's associate interested plaintiff inducing her to enter into a contract for the purchase of several acres of orchard land. Pursuant to the contract, plaintiff made some cash payments, and transferred valuable land to appellant's associate in satisfaction of the contract. Appellant knew of the transaction, and knew that the corporation had no assets, and in fact admitted that he was the corporation. Held that, though he did not receive the proceeds from plaintiff's land, or her cash payment, appellant was liable to plaintiff in an action to recover the same. (Page 268.)

Appeal from District Court, Sixth District; *Hon. Joseph H. Erickson*, Judge.

Action by Pricilla Roper against A. J. Crosier and others.

Judgment for plaintiff. Certain defendants appeal.

Appeal from Sevier County, Sixth District

AFFIRMED as to A. J. Crosier; **REVERSED** as to Maggie Crosier and others.

M. E. Wilson for appellants.

D. H. Wenger for respondent.

CORFMAN, J.

This was an action instituted in the district court of Salt Lake County by the plaintiff to recover from the defendants \$2,500 alleged to have been paid by the plaintiff to apply on orchard land contracts with a corporation organized by the defendants. A change of venue was had to the district court of Sevier County, where a trial to the court, without a jury, resulted in a judgment in plaintiff's favor against all of the defendants. The defendants, other than J. H. Nelson, appeal from the judgment.

The amended complaint in substance alleges:

"That the defendants, on or about the 22d day of August, 1910, entered into an alleged agreement to form and organize a corporation to be known as the Salina Orchard & Loan Company, and filed their articles of agreement with the secretary of state of the state of Utah on the 19th day of September, 1910, and on the same day the secretary of state issued a certificate of incorporation to the said Salina Orchard & Loan Company under the laws of the state of Utah. That the pretended business of the alleged corporation, according to the articles of agreement, was, among other things, to purchase, improve, and sell real estate. The articles further provided that the limit of the capital stock agreed upon was \$1,000, consisting of 100 shares, of the par value of \$10 per share, and that defendants subscribed for the whole thereof. In the articles A. J. Crosier was named as president, Carl Forshee as vice president, and J. H. Nelson as secretary and treasurer of said alleged corporation. That attached to and made a part of said alleged agreement are the affidavits of A. J. Crosier, Maggie Crosier, and Carl Forshee that not less than 10 per cent. of the capital stock of the corporation had been

paid. That the right of said corporation to do business in the state of Utah was annulled and its charter revoked by the Governor of the state of Utah on the first Monday of April, 1913, under the provisions of the act of the Legislature of the state of Utah (chapter 106 of the Laws of Utah of 1909). That the company was not incorporated in good faith by the defendants, that no directors' meetings as such were ever held, and the corporation was merely a dummy, to shield the collusive, fraudulent, and deceitful transactions of the defendants, as hereinafter alleged, who were the promoters, stockholders, and directors of said alleged corporation. That the corporation never was solvent, never owned any property of any kind, and never had any legitimate resources. That at various times prior to the 15th day of February, 1911, at Salt Lake City, Utah, the defendants, pretending to act as such directors and officers of said alleged corporation, fraudulently, with the intent to induce the plaintiff to purchase purported orchard land from said alleged corporation at a high price, did falsely and fraudulently publish, advertise, aver, and represent to the public at large, and to this plaintiff, that the corporation owned and controlled a large tract of land, and that the corporation was solvent, whereas, in truth and in fact, the said alleged corporation did not then and never owned or controlled any orchard land, or any other land of any class, kind, or description, all of which the defendants well knew, and that said representations were made by the defendants for the purpose of deceiving the public and this plaintiff. That on or about the — day of February, 1911, plaintiff, relying on, confiding in, and believing said representations so made by the defendants, went to the county of Sevier to inspect said orchard lands, and was by the defendants shown some orchard land that the defendants falsely and fraudulently represented to this plaintiff that the alleged corporation owned and controlled the same. That the defendants then and there well knew that said corporation did not own or control the same, or any part thereof. That the plaintiff, confiding in and believing said representations to be true, agreed to purchase ten acres of said alleged orchard land

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from said corporation through its officers, defendants herein, and thereafter on the 15th day of February, 1911, was induced to and did enter into ten alleged contracts, numbered 30 to 39, both inclusive, for the purchase of ten acres of orchard land in tracts of one acre each, including water, at the rate of \$550 per acre, payable in monthly installments of \$6 per month, without interest or taxes, all of said contracts being in the same language, tenor, and effect. That the said contracts in behalf of said alleged corporation were signed, executed, and delivered by the said A. J. Crosier as president and the said J. H. Nelson as secretary, and the defendants in each of said alleged contracts represented as follows: 'Second. (a) That the said acre of orchard is a unit of a large tract of land owned and controlled by the within company. (b) That the said acre shall be planted in the season of 1911 to commercial apples, and shall be cared for by the company for a period of five years from the date of planting. (c) That all trees dying within five years from the date of planting shall be replaced at the expense of the company. * * * Fourth. That the deed for the acre of land purchased by the holder of this contract shall be placed in escrow with the Mt. Pleasant Commercial & Savings Bank, at Mt. Pleasant, Utah.' That said representations, conditions, and promises so made in each of said contracts were false, fraudulent, all of which the defendants well knew, and were made for the purpose of cheating and defrauding this plaintiff. That the company did not then, or at any other time, own any orchard or other land, and that by reason thereof the conditions in said contract could not be complied with by said company. That the plaintiff, confiding in and relying on said representations so made by the defendants, was induced to accept said contracts and agreed to pay for said alleged land, believing she was buying orchard land from said corporation. That plaintiff paid to said defendants the initial payment of \$6 on each contract according to the terms thereof, amounting to the sum of \$60, and did enter into a further agreement with the defendants, who were pretending to act as such officers of said corporation on the 20th day of February, 1911, by the terms of which the plaintiff

was to and did convey to the defendant J. H. Nelson by a good and sufficient deed of conveyance, as she was informed and believed, for the use and benefit of the corporation, the following described real estate and premises, to wit: Lots 2 and 3 in L. H. Rockwell's First addition, a subdivision of lot 14, block 16, five-acre plat A, Big Field survey, in the city and county of Salt Lake, state of Utah, commonly known as No. 1399 McClelland avenue, for the agreed value of \$2,500, for which amount said J. H. Nelson, as secretary and treasurer, acknowledged receipt, and for which amount the plaintiff was to have a credit on said alleged contracts with said alleged corporation, but which was appropriated to defendant's use. That in the month of October, 1911, the plaintiff first learned the truth in relation to said representations, promises, and agreements, and discovered that they were false and fraudulent, and that the alleged contracts were void, in that no real estate was described therein, and no deed placed in escrow as therein promised, and that the alleged company was not the owner of any orchard land, or any other land, and never had been such owner, and that the defendants induced the plaintiff to enter into said fraudulent contracts for the purpose of cheating and defrauding the plaintiff out of her money and property, and did so cheat and defraud the plaintiff, and the plaintiff received nothing for the money, amounting to \$2,560, so paid to the defendants. That the plaintiff has frequently demanded of the defendants the return of the money so wrongfully obtained from the plaintiff by defendants, but that defendants have failed and neglected to pay the same. That there is due and owing from the defendants to the plaintiff the sum of \$2,560, with interest thereon at the rate of 8 per cent. per annum from the 20th day of February, 1911."

The answer of the defendants appealing denies generally all the allegations of the complaint, except it admits the organization of the corporation and that the defendants were the officers thereof. Briefly stated, the facts disclosed by the testimony at the trials show: That a few months after the corporation, Salina Orchard & Land Company, had been

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formed by the defendants, with a limited capital of \$1,000, of which 10 per cent. had been paid in, the defendant J. H. Nelson, the corporation's secretary and treasurer, called at the home of the plaintiff in Salt Lake City and solicited her to purchase lands, represented to be owned by the company, situated at or near Salina, Utah. That the plaintiff became interested and thereafter went to Salina, investigated the lands, and, after doing so, on the 15th day of February, 1911, entered into ten separate written contracts with the company, denominated "orchard purchasing and land contracts," providing for the purchase from the company by her of ten one-acre tracts of land at \$550 per acre, payable in monthly installments of \$6 per month on each contract. These contracts were signed on behalf of the company by the defendant A. J. Crosier as president and the defendant J. H. Nelson as secretary, and provided, among other things, that each acre tract called for therein was "a unit of a large tract of land owned and controlled by the within company." The contracts also provided that a deed should be placed in escrow for each acre tract with the Mt. Pleasant Commercial & Savings Bank at Mt. Pleasant, Utah, to be delivered to the purchaser upon final payment and discharge of the plaintiff's indebtedness to the company. Upon the execution and delivery of the contracts to the plaintiff, a receipt, signed by the defendants A. J. Crosier as president and J. H. Nelson as secretary, was given the plaintiff for \$60, the initial payments on the ten contracts. On the 20th day of February, 1911, the plaintiff entered into a written agreement with the defendant J. H. Nelson, as secretary of the company, to convey to him certain real property situated in Salt Lake City for a consideration of \$2,500, to be applied as first payments on the plaintiff's ten orchard contracts aforementioned, and thereafter, in pursuance of this agreement, on the 7th day of March, 1911, the plaintiff executed and delivered a deed to the defendant J. H. Nelson for her Salt Lake City real property, and later, by deed dated June 15, 1911, the defendants J. H. Nelson and Alice O. Nelson, his wife, conveyed the same to one J. F. Knowles and wife, of Salt Lake City. The testimony shows

that the defendant A. J. Crosier made some inquiry concerning the value of the real property thus conveyed by the plaintiff to the defendant J. H. Nelson, and asserted that Nelson wished to make a trade and take the plaintiff's property as part payment for the purchase price of some lands belonging to the Salina Orchard & Land Company. The plaintiff, after parting with her Salt Lake City property, in thus seeking to make payments on her orchard contracts, made investigation, and, in October, 1911, ascertained that the Salina Orchard & Land Company had no assets, and that it did not own or control any lands. The defendant A. J. Crosier then asserted that he in fact was the company; that he owned the land, and was prepared to make the company orchard contracts good, but complained that the defendant Nelson had failed to account for and turn over anything on account of having received a conveyance of the plaintiff's Salt Lake City property and disposing of it to third parties, and asserted that it was his understanding that under the terms of plaintiff's orchard contracts with the company they had become null and void by reason of the plaintiff's failure to make the monthly payments as called for in them. It further appears from the record of the testimony that the charter of the Salina Orchard & Land Company was declared annulled on the 2d day of April, 1912, by reason of the nonpayment of the annual license tax provided for under the Utah statutes.

While numerous errors are assigned concerning the admission of testimony over the objection of the defendants appealing, the more important, and we think the controlling, question to be determined on this appeal is whether or not the evidence was sufficient to justify the findings of the 1, 2 trial court and its rendition of judgment in favor of the plaintiff and against the defendants. It appears from the undisputed testimony that the defendants formed a corporation, ostensibly, at least, for the purpose, among other things, of purchasing, improving, and selling real estate, with a limited capital of \$1,000 divided into 100 shares, of the par value of \$10 each, of which the defendant A. J. Crosier subscribed for forty-eight shares, the defendant J. H. Nelson

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forty-nine shares, and the other defendants one share each; that the company never held any meetings of its board of directors, or transacted business in its corporate capacity or otherwise, except through its president, the defendant A. J. Crosier, and its secretary and treasurer, the defendant J. H. Nelson. It further appears that the defendant J. H. Nelson, acting for the corporation, induced the plaintiff to enter into the contracts in question for the purchasing of the corporation orchard lands, for which she made the initial payments of \$60 and thereafter conveyed to Nelson certain real property, which was receipted by Nelson to further apply as payments on those contracts. In these transactions it does not appear that the defendants Maggie Crosier, Carl Forshee, and Alice O. Nelson participated as officers or otherwise, except in the organization of the company, which, in itself, does not disclose any intendment of fraud or wrongful dealing on their part.

As to the defendants A. J. Crosier and J. H. Nelson, assuming to act as officers for the corporation in the making of the contracts with the plaintiff for the purchase of orchard lands of the Salina Orchard & Land Company, when it neither owned nor controlled any lands, or had any assets, we think the findings of the court are fully justified. True, the record here does not disclose that the defendant A. J. Crosier actually received the benefit of the plaintiff's payments of money and property; but the testimony conclusively shows that he was one of the prime movers in the forming of a corporation and in the making of the contracts as an officer with the plaintiff, wherein the plaintiff, in anticipation that she was to have and receive orchard lands, separated herself from her money and real property at a time when he knew, or at least it was his duty to know, that the corporation had nothing to give in return, unless he, as a promoter and officer, saw to it that the corporation was rendered capable of fulfilling its obligations to, and make good its undertakings with, the plaintiff. As stated by the authorities cited in appellant's brief, and particularly in 2 Thompson on Corporations, section 1283:

“The general rule as to trustees is that they are responsible only for their own acts, and not for the acts of each other, unless by express

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agreement, 'or they have by their own voluntary co-operation or connivance enabled the other to accomplish some known object in violation of the trust.' "

But when, as here, the defendant A. J. Crosier, as the evidence conclusively shows, was actually participating in the organization of a corporation wholly incapable of performing its contracts entered into with the plaintiff by himself as an officer, and then standing by, knowingly permitting the plaintiff to make in good faith payments to his co-officer to satisfy her indebtedness to the corporation, he may not be heard to say he received no actual benefits thereby, and the general rule quoted does not apply; for, if it did, the corporate existence would become a mere cloak for its incorporators to practice fraud and deceit. 1 Beach, Priv. Corp. section 163; *McGrew v. City Produce Exchange*, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771; *Donovan v. Purtell*, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176; *Heckendorn v. Romadka*, 138 Wis. 416, 120 N. W. 257.

Having carefully reviewed the record, we are of the opinion that as to the defendant A. J. Crosier the judgment of the trial court should be affirmed; as to the other defendants appealing, we think the evidence is insufficient to support the findings and judgment, and, as to them, the judgment should be reversed. It is so ordered. Defendant A. J. Crosier to pay all costs.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

GRAY v. BULLEN et al.

No. 2997. Decided August 25, 1917. (167 Pac. 683.)

1. ACCORD AND SATISFACTION—PART PAYMENT. Where the debt or demand is liquidated or certain, and is due, payment by the debtor and receipt by the creditor of a less sum, there being no new or independent consideration, is not a satisfaction thereof, although the creditor agrees to accept it as such. (Page 273.)
2. CORPORATIONS—PROMOTION—ISSUANCE OF STOCK. Where one corporation promoter was promised 8,200 shares of stock, should the corporation be organized, he could not complain that the stock was

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not issued to him, when the corporation was not organized, in the absence of proof that failure to organize it was due to the acts of the defendants. (Page 274.)

Appeal from District Court, Third District; *Hon. Geo. G. Armstrong*, Judge.

Action by William Gray against H. Bullen and others, doing business as the Dreamland Leasing Company of Utah.

Judgment for defendants. Plaintiff appeals.

REVERSED and REMANDED, with directions.

Chris Mathison for appellant.

Gustin, Gillette & Brayton and *Parley P. Jenson* for respondents.

FRICK, C. J.

The plaintiff sued the defendants, H. Bullen, H. A. Peder-son, J. W. Rooklidge, George Wilson, and Roy Bullen, "doing business as the Dreamland Leasing Company of Utah," to recover judgment for \$676 and for the value of 8,200 shares of stock, alleged to be of the value of 10 cents per share. It is not necessary to refer to the pleadings, except for the purposes hereinafter indicated. The evidence is very short, and is practically without conflict. The action is based upon a letter, addressed to the plaintiff, which reads as follows (on letter head of Dreamland Leasing Company of Utah):

"August 14, 1909.

"Mr. Wm. Gray, City—Dear Sir: This letter is written you in order to have a clear understanding of the condition of your account with the Dreamland Leasing Company, and it is to be considered as an acknowledgment of liability and if assigned to any other person their claim will be protected to that amount. According to my books, you have \$550 due you on the drift and shaft contract and 4,000 shares of the stock of the company; on the drifting contract you have \$126 due you and 4,200 shares of the stock—making in all \$676

and 8,200 shares of stock. Dreamland Leasing Company of Utah, by J. W. Rooklidge, Secretary."

Mr. Rooklidge, signer of the foregoing letter, testified that all of the parties named at the beginning of this opinion, except H. A. Pederson, were partners doing business as the "Dreamland Leasing Company of Utah." The evidence, without conflict, is to the effect that the parties aforesaid had a lease on a certain mine in Nevada which they were developing; that they intended to organize a corporation on said lease, and in case that were done the plaintiff, in addition to the \$676, was also to receive the 8,200 shares of stock, both of which are mentioned in the letter; that the plaintiff was employed by the defendants to do work on the mine aforesaid, and that, in so far as the stock was concerned, he was, in a sense, a partner, and was to receive the stock in case the mining lease was incorporated, but, so far as the \$676 was concerned, he was not connected in any way with the defendants, but that he had earned that amount in working for the defendants named, except the defendant Pederson. The testimony also showed that another writing was entered into between plaintiff and the defendant Rooklidge, which reads as follows:

"Salt Lake, August 14, 1909.

"In consideration of the surrender of this statement to me, not later than sixty days from date, I hereby agree to pay the holder the sum of fifty dollars—notice to be given me ten days in advance by holder, and nothing is to be done before October 14, 1909.

J. W. Rooklidge."

Indorsed on back:

"Pd. \$10.00 Dec. 6/10. Pd. \$10.00 Jan. 6/11. Pd. \$10.00 Feb. 6/11. \$10.00 Mar. 20/11. \$10.00 Apr. 17/11. Wm. Gray, Jr."

That writing was pleaded as a defense, and it was shown without dispute that the \$50 mentioned therein had been paid by Rooklidge to the plaintiff between December 6, 1910, and April 17, 1911. The court found that the payment had been made as aforesaid, and as a conclusion of law also found that the obligation assumed in the original letter had thereby been

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fully paid and discharged, and entered judgment in favor of the defendants. The plaintiff appeals from that judgment.

The defendants did not set up accord and satisfaction nor a general release as a defense, but they relied upon the defense of payment, and the court bases its conclusion of law and judgment entirely upon that defense. Can the conclusion of law be sustained? As we have seen, the evidence 1 is undisputed that the defendants, except probably Pederson, were indebted to the plaintiff as partners in a specific sum. The amount due was fixed and certain. In view of the relations sustained by the defendants among themselves, the defendant Rooklidge was obligated for the whole amount due, the same as each of the other defendants was obligated. When Rooklidge paid the \$50, therefore, he merely paid his own debt. The question, therefore, arises whether a debtor may pay or discharge a fixed and certain indebtedness then due by merely paying a lesser sum than the amount of his indebtedness to his creditor. The law is very clearly stated in 1 Cyc. 319, in the following words:

“Where the debt or demand is liquidated or certain, and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given. Payment of a less amount than is due operates only as a discharge of the amount paid, leaving the balance still due, and the creditor may sue therefor, notwithstanding the agreement. A court of equity has no power to enjoin collection of the balance.”

In *Smoot v. Checketts*, 41 Utah, 211, 125 Pac. 412, Ann. Cas. 1915C, 1113, the headnote correctly reflects the decision, and it is there stated:

“When it is claimed that payment by the debtor of a sum less than is due to the creditor is a payment in full discharge of the entire amount due, a receipt acknowledging full payment is not controlling; but it must also appear that the payment was based on a sufficient independent consideration, or on a compromise of a disputed or unliquidated claim.”

The same principle is announced in the case of *Rohwer v. Burrell*, 42 Utah, 517, 518, 134 Pac. 573.

The case at bar leaves no room for controversy upon the question of an independent consideration. The agreement between Rooklidge and the plaintiff is in writing and speaks

for itself. The consideration is there stated in the following words: "In consideration of the surrender of this statement to me," etc. Now, that is the consideration, and the only consideration, for the release of a fixed and absolute indebtedness then due, amounting to \$676. The real consideration there mentioned is the surrender of the statement wherein the indebtedness was fixed. The real transaction, therefore, amounted merely to this: Rooklidge paid a fixed debt, amounting to \$676, by agreeing to pay \$50, which he paid. In other words, an indebtedness of \$676 was paid with \$50. In case a debtor is unable to pay his debts in full, there are several legal methods by which he may discharge and satisfy his debts without making payment in full. He may file a petition in bankruptcy, and, if insolvent, may be discharged. He may enter into a composition agreement with his creditors, and be discharged, or he may make an accord and satisfaction with any one or all of his creditors, and thus satisfy his debts. He may, however, not pay off his debts by merely paying, or agreeing to pay, a sum less than the amount of the debt, without some legal independent consideration which in law would amount to an accord and satisfaction. In this case there is absolutely no consideration for the pretended release, and hence the conclusion of law and judgment are against law.

The claim for the 8,200 shares of stock, however, stands upon a different footing. As to that claim the testimony of Mr. Rooklidge is not disputed. According to his testimony the plaintiff was interested with the defendants in organizing the corporation, and he was to receive the 2 stock only in case the corporation was organized. The corporation was not organized, and no stock was issued, or can be issued. There is no allegation or proof, however, that the respondents were responsible, or that the corporation was not organized through any fault of theirs. The promise to issue the stock was therefore conditional, and not absolute, and, the condition not having materialized, the plaintiff cannot complain, unless he shows that the defendants were the cause of the failure to organize the corporation and to issue the stock. Nothing of that character is found, either in the

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pleadings or in the evidence and hence we are clearly of the opinion that, as to the 8,200 shares of stock, the plaintiff has no cause of action against the defendants or either of them.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Salt Lake County, with directions to grant plaintiff a new trial. Costs to appellant.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

SPANISH FORK CITY v. JARVIS et al.

No. 3001. Decided August 25, 1917. (167 Pac. 806.)

APPEAL AND ERROR—REVIEW—FINDINGS. Findings of fact by the trial court in an equity case will not be disturbed where the great weight of the evidence supports them.¹

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by Spanish Fork City, a municipal corporation, against George Jarvis and others.

Judgment for defendants. Plaintiff appeals.

AFFIRMED.

Elias Hansen for appellant.

Booth & Booth for respondents.

CORFMAN, J.

This action was brought by the plaintiff against the defendants in the district court of Utah County to determine the right to the use of water. In substance the complaint alleges: That during the year 1914 the Denver & Rio Grande Railroad Company in the construction of a railroad for the Utah Rail-

¹ *Jones v. Bonanza M. & M. Co.*, 32 Utah, 440, 91 Pac. 273; *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397, 23 L. B. A. [N. S.] 414, 19 Ann. Cas. 660.

way Company, east of Spanish Fork City, developed a supply of water sufficient for beneficial use in irrigation; that the water thus developed was seepage water and, therefore, had never flowed in channels, either above or below the earth, until collected in a cut dug by said railroad company and diverted by a stream flowing westerly toward Spanish Fork City; that the plaintiff purchased the water from the railroad company and received a conveyance in writing therefor; that about two second feet of water was thus developed; that said water was purchased by the plaintiff for the irrigation of lands within Spanish Fork City, and that the defendants wrongfully and without right claim an interest therein adversely to the plaintiff. Plaintiff prayed that the defendants be adjudged to have no rights to the water adverse to the plaintiff, and that the defendants be enjoined from interfering with plaintiff's right to control the water, and for general relief. The answer denied generally and specifically the allegations of the complaint, and affirmatively alleged by way of answer and counterclaim that the water arose in certain springs, and that for more than twenty years, by means of ditches and canals, the defendants, their grantors and predecessors in interest, had collected the water from the springs and applied it to a beneficial use in the irrigation of their lands; that they were and are the lawful owners and have the right to the use of all the water, and prayed that their interests and claims be adjudged lawful, and their right to the use of the water quieted by decree of court. Trial was to the court without a jury. Judgment and decree was for the defendants. Motion for new trial was made and denied. Plaintiff appeals and assails the findings of fact, conclusions of law, and decree of the court upon the grounds that they are not supported by the evidence and are contrary to law. The findings complained of are as follows:

“That when, in 1914, a new line of railway was constructed and a cut through the lands above said springs was made, the most of the waters from said springs was cut off, but just as soon as said cut was completed sufficiently to permit it, the said waters were gathered together from said cut, and were

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without objection from any person whomsoever immediately conveyed to the lands of the defendants aforesaid, and were by the defendants used for the irrigation of said lands and for the other beneficial purposes hereinbefore mentioned, and the said waters have always been in the possession and under the control of the defendants, except for a short time in October, 1914, when the plaintiff attempted to take said water under its control. That prior to the construction of said railroad cut, the waters came to said springs in well-defined underground channels, and in the construction of said railroad cut, the said well-defined underground channels through which the waters of said springs were conveyed were cut off, and the water was thus interrupted in its flow to the said springs. That said water supplying said springs was not and is not seepage or percolation water. That by the diversion and conveying, regulating, and distributing of the said waters by the defendants for twenty-three years last past, the defendants have become the owners of the said waters and the whole thereof with the undisturbed right to use the same upon their said lands, and the right to use for domestic and culinary purposes, including the watering of stock. That in the construction of the said railroad cut, no additional water was developed, but the waters of said springs were cut off and caused to flow in a surface channel instead of in said underground channels as aforesaid. That the Denver & Rio Grande Railroad Company, or the Utah Railroad Company, or both of said companies, did not acquire any water right by the construction of the said cut and the interrupting of the flow of the underground channels from which said springs were supplied."

The conclusions of law and decree of the court follow and are in conformity with the foregoing findings complained of by the plaintiff.

We have carefully reviewed the record of the testimony adduced at the trial, and we deem it unnecessary to here make a detailed statement of our findings with respect thereto. Suffice it to say that, as we view the record, the findings of

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the trial court are in conformity with and are supported by the great preponderance of the testimony.

This being an equity case, in harmony with the repeated decisions of this court, the findings and judgment of the trial court will not be disturbed where, as here, the great weight of the evidence supports them. *Jones v. Bonanza M. & M. Co.*, 32 Utah, 440, 91 Pac. 273; *Campbell v. Gowans*, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660:

It is ordered that the judgment of the district court be affirmed. Defendants to recover costs.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

WHITE v. UTAH CONDENSED MILK CO.

No. 2965. Decided August 25, 1917. (167 Pac. 656.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—PROMISE TO REMEDY DEFECTS. Where the facts and circumstances are such that by reason of some defect in machinery or appliances the servant, by reason of his knowledge, experience, and appreciation of the danger, would be held to have assumed the risk in case of an accident, yet, if the master promises to remedy or repair such defect so as to make the machinery or appliances reasonably safe, and the servant, in reliance of such promise, remains in the employ of the master and continues to discharge his duties as before, the master assumes the risk of injury for at least a reasonable time, unless the danger is so obvious that no man of ordinary prudence would continue to discharge the duties of the servant in view of the danger.¹ (Page 283.)
2. MASTER AND SERVANT—QUESTIONS FOR JURY—ASSUMPTION OF RISK—PROMISE TO REMEDY. Where the servant testified that the master promised to provide a guard for a steam gauge; that he relied thereon—whether there was such a promise and whether the servant relied thereon was for the jury. (Page 285.)
3. MASTER AND SERVANT—QUESTIONS FOR JURY—ASSUMPTION OF RISK—OBVIOUS RISKS. Ordinarily it is for the jury whether the danger is so imminent and obvious that a man of ordinary prudence would not have continued in the employ notwithstanding the promise. (Page 285.)
4. MASTER AND SERVANT—QUESTIONS FOR JURY—ASSUMPTION OF RISK—OBVIOUS RISKS. Evidence held not to warrant saying as a

¹ *Johnson v. Mining Co.*, 41 Utah, 142, 125 Pac. 407.

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- matter of law that the injured servant assumed the risk notwithstanding the master's promise to remedy the danger. (Page 285.)
5. **MASTER AND SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK—OBVIOUS RISKS.** Where the court submitted the issue whether the master promised to remedy the danger and the servant relied thereon, and instructed that unless the danger was imminent the servant could not recover, and the jury found for plaintiff, it was error to refuse the requested instruction, precluding recovery if the danger was so obvious that a person of ordinary prudence would not have incurred it, notwithstanding which the servant continued work. (Page 286.)
6. **EVIDENCE—EXTENT OF INJURIES.** The injured servant could not testify that when he applied for work after the injury, defendant's manager said that they would not feel safe with him at work, owing to his defective sight caused by the injury; the real purpose being to show the extent of injury as viewed by defendant, and not the fact that the servant was refused employment, which he could show.¹ (Page 287.)
7. **EVIDENCE—ADMISSION OF SERVANT—ADMISSIBILITY.** The admissions of the employer's general manager, outside the scope of his employment, as to extent of a servant's injuries, are not admissible against the employer. (Page 288.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Walter White against the Utah Condensed Milk Company.

Judgment for plaintiff. Defendant appeals.

REVERSED AND REMANDED with directions.

King & Nibley and *P. T. Farnsworth* for appellant.

Geo. Q. Rich and *A. A. Law* for respondent.

FRICK, C. J.

This is an action to recover damages for personal injuries. The plaintiff, in his complaint, in substance, alleged that at, and for some time before, the accident resulting in his in-

¹*Meyers v. S. P., L. A. & S. L. E. Co.*, 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1229; *Id.*, 39 Utah, 198, 116 Pac. 1119; *Idaho F. Co. v. Firemen's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586.

juries he was in the employ of the defendant, a corporation, in its steam milk condensing plant as stationary engineer having charge of the defendant's steam boilers, steam separator, engine, etc.; that in operating said steam separator and boilers it was necessary to have a glass gauge, which was subjected to great pressure by the steam generated in said boilers, and that in performing the duties imposed on him plaintiff, at frequent intervals, was required to go near said glass gauge; that the glass tube composing said gauge, by reason of the aforesaid pressure, would frequently burst, and, in case it did so, the steam pressure to which it was subjected would cause said glass tube to break into numerous pieces or fragments which would be thrown in all directions throughout the boiler room where plaintiff was required to be; that said glass gauge, on the 8th day of February, 1915, by reason of the pressure aforesaid, exploded with great violence, and by reason of the fact that the defendant had negligently omitted to place any shield or guard over the glass tube the pieces or fragments of glass were scattered and thrown to where the plaintiff at the time was required to be, and some of the pieces or fragments of glass were thrown at and forced into plaintiff's eye, thereby causing his eyesight in one of his eyes to be permanently injured and affected; that some time before the bursting of said glass gauge as aforesaid the plaintiff demanded that the defendant procure some shield or guard and place the same over said glass gauge so as to protect the plaintiff from being injured by the flying particles or fragments of glass in the event said gauge should burst or explode as aforesaid; that defendant then and there "promised and agreed with plaintiff that if plaintiff would remain at work in said engine room as defendant's said engineer, the defendant would repair said defect in said machinery by installing, as soon as the same could be procured on the market, an eye guard for the said glass gauge as requested by the plaintiff"; that the plaintiff relied on said promise, and continued to discharge the duties as aforesaid; that the defendant disregarded the promise made as aforesaid, and, as a consequence, plaintiff was injured as before stated. The plaintiff also

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alleged that there were guards or shields on the market which were inexpensive, and which could have been procured by the defendant and attached to said glass gauge so that in case the same was caused to burst or explode as aforesaid said guard or shield would have prevented the pieces or fragments of glass from being thrown out into the room or to where the person operating said boilers, etc., was necessarily required to be. The defendant filed its answer to the complaint, and, after denying the alleged negligence on its part and the alleged promise set forth in the complaint, it also affirmatively averred that if plaintiff was injured as aforesaid, the injury was the result of his own negligence and want of care; that he was thoroughly acquainted with, and fully appreciated, the danger to which he was exposed in the performance of his duties as engineer, and that he had assumed the risk of injury. Defendant also pleaded a further defense, which, however, is of no consequence. The case was submitted to a jury, which returned a verdict for plaintiff, and the defendant appeals.

Counsel for defendant have assigned and argued numerous errors relating to the instructions given by the court and to the refusal of the court to charge as requested, and to the admission of certain evidence. We shall consider such assignments as we deem material in their order.

The court, at the request of the plaintiff, in substance, charged the jury that if they found from a preponderance of the evidence that the glass gauge was situate as alleged in the complaint, "that there was imminent danger of the same bursting and inflicting injury upon the plaintiff while at work"; that at that time there was an appliance in common use and for sale on the market which, if installed, would have "prevented any injury resulting from the breaking of such glass gauge"; that plaintiff had directed defendant's attention to the "danger resulting from the breaking of said glass gauge," and that said danger could have "been prevented by the purchasing and installing of said appliance"; that the defendant promised that it would remedy such defect by supplying said "eye guard," and that plaintiff, relying on said promise, continued to operate defendant's machinery as he

had theretofore done; that the defendant failed and neglected to remedy said defect by purchasing and installing the afore-said appliance preventing the danger from the bursting of said glass gauge, and that said glass gauge bursted or exploded, and by reason of its failure to comply with the matters before stated the plaintiff was injured by fragments of said glass gauge penetrating his eye, "then and in such event you are instructed that your verdict in this case must be for the plaintiff and against the defendant." The defendant excepted to the foregoing charge. The foregoing statement was followed in the same paragraph by the further statement that in case the jury found "that the accident did not occur within a reasonable time" after the alleged promise of the defendant, they could find for the plaintiff; and the court further charged:

"But unless you find by a preponderance of the evidence in this case that it is the general custom among persons owning and operating steam plants of the character of that in which plaintiff met with his accident to install and maintain eye guards about the glass gauges on steam separators therein, your verdict must be in favor of defendant and against plaintiff."

To the portion of the charge last referred to the defendant did not except. Defendant's counsel now insist that that portion of the foregoing charge which is excepted to states all of the elements which, in the judgment of the court, were necessary to authorize the jury to return a verdict in favor of the plaintiff, but that not all of the elements necessary to a recovery are included in the court's statement, and for that reason the charge is erroneous. As pointed out, the court added at least two other propositions to that part of the instruction to which defendant's counsel excepted and which they now insist did not contain all of the elements necessary to a recovery. The particular complaint which counsel make to that part of the instruction excepted to is that it entirely excluded from the jury the defenses of assumed risk and contributory negligence. It will be observed that the court did not include in that part of the charge excepted to, nor in the

portion not excepted to, the element of assumed risk except by referring to the alleged promise of the defendant. The duty that is ordinarily imposed upon the servant in case the master has promised to remedy some defect in machinery or appliances, or the place of work, is entirely omitted.

Counsel for defendant insist that, under the undisputed evidence in this case, the plaintiff, as a matter of law, assumed the risk of injury incident to the bursting of the glass gauge aforesaid; that he could recover only in case that the jury found that, although the alleged promise was made, and that by reason of that promise he continued in the defendant's employ, yet, if the jury should further find that the danger was so imminent and "obvious that a reasonably prudent man would have declined to work at and near said glass gauge notwithstanding such promise," the plaintiff could not recover in this action. The foregoing elements were embodied in the request to charge offered by the defendant, but the court refused to charge as requested.

Counsel contend that the court erred in refusing to so charge and in entirely omitting from its charge the elements or propositions contained in its request. The law is well settled that where the facts and circumstances are such that by reason of some defect in machinery or appliances the servant, by reason of his knowledge, experience, and appreciation of the danger, would be held to have assumed the risk in case of an accident, yet, if the master promises to remedy or repair such defect so as to make the machinery or appliances reasonably safe, and the servant, in reliance of such promise, remains in the employ of the master and continues to discharge his duties as before, the master assumes the risk of injury for at least a reasonable time, unless the danger is so obvious that no man of ordinary prudence would continue to discharge the duties of the servant in view of the danger. The rule is stated in various terms by the different writers and courts, but the substance of all the different statements is practically the same. In *Johnson v. Mining Co.*, 41 Utah, 142, 125 Pac. 407, Mr. Justice McCarty, speaking for this court, states the rule thus:

"The rule as declared by practically all of the authorities is that, when the master in response to a complaint made by a servant of the unsafe and dangerous condition of the place in which the servant is at work promises to eliminate the particular danger complained of by putting the premises in a reasonably safe condition, and the servant, relying on the promise, continues at work for a reasonable time thereafter, the master, and not the servant, assumes the risks of the danger complained of during such reasonable time, unless the place is so obviously dangerous that a reasonably prudent man would decline to work there, notwithstanding the promise of the master."

In 1 *Sherman & Redfield, Law of Neg.* (6th Ed.), in concluding section 215, where the rule is discussed, it is said:

"There is no longer any doubt that where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept."

In 26 *Cyc.* 1209, the rule is stated in the following words:

"Where the master or some one acting in his place promises to remedy the defect complained of, the servant by continuing in his employment for a reasonable time after such promise does not assume the risk of injury from the defect unless the danger was so patent that no person of ordinary prudence would have continued to work."

In 2 *Cooley on Torts* (3d Ed.) p. 1159, the author, after substantially stating the rule as in the foregoing quotations, concludes as follows:

"If the danger is obvious and such that a reasonably prudent man would not incur it, the rule does not apply, and the servant continues at his own risk."

The United States Supreme Court, in the recent case of *Seaboard, etc., Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, re-affirmed in 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458, in the headnote to the opinion in 233 U. S., states the rule in the following language:

"Where there is promise of reparation by the employer, the continuing on duty by the employee does not amount to assumption of risk unless the danger be so imminent that no ordinarily prudent man would rely on such promise."

It is unnecessary to pursue the authorities farther.

Appeal from Cache County, First District

The question, therefore, is, does the doctrine stated in the foregoing cases apply to the case at bar?

The plaintiff testified that a promise was made by the general manager of the defendant that a guard or shield would be obtained to obviate the danger of injury from the bursting of the glass gauge, and that he requested the plaintiff to remain at his post in the engine room as before. 2, 3, 4 The plaintiff also testified that in reliance on the promise he remained in the employ of the defendant as before, and that the explosion occurred in about ten days or two weeks, or, perhaps, a little longer, after the promise was made. In the case cited from 239 U. S. there was a promise, as in the case at bar, and the question was whether the danger arising from the bursting of a glass gauge similar to the one in question here was "so imminent that no ordinarily prudent man would rely on the promise," and it was there held that the court could not say, as a matter of law, that the danger was such. Counsel for the defendant in this case insist that in this case the danger was so obvious and imminent that an ordinarily prudent person was not justified in relying on the promise to repair or remedy the defect, and hence plaintiff assumed the risk as a matter of law, notwithstanding the promise. In view of the evidence in this case there is much force to counsel's contention. The evidence is undisputed that the plaintiff was the only person who knew that there was such a thing as a shield or guard, and he alone seemed to be informed where such a shield was procurable. According to his testimony, when he spoke about it, the general manager did not seem to understand what was meant by a shield or guard. Moreover, the plaintiff had full charge of the boilers, the steam separator, and engine, and he himself was the only one who seemed to know and appreciate the real danger arising from the bursting of the steam gauge. If a servant ever assumes the risk of danger, it would seem that in the absence of a promise the plaintiff would have done so in view of the undisputed facts and circumstances of this case. The promise to remedy the defect must, however, also be kept in mind. While it is true that the general manager denied that he made

any promise, and the circumstances seem to be in his favor, yet, in view that the plaintiff testified to the promise, and that he relied thereon, it was for the jury to say whether the promise was made and whether the plaintiff, in relying thereon, remained in charge of the boilers, etc. Ordinarily it is a question of fact for the jury, as pointed out by the Supreme Court of the United States, in the case last cited, whether the danger is so imminent and obvious that no man of ordinary prudence would have continued in the employ notwithstanding the promise. We are not prepared to say that the evidence is of that character in this case to authorize us to say as a matter of law that the plaintiff assumed the risk notwithstanding the promise.

As we have pointed out, however, the court, at plaintiff's request, charged the jury that, unless they found that the danger was imminent, they could not find for him. The jury in returning a verdict in his favor, therefore, must have found that the danger was imminent, and they 5 could hardly have avoided arriving at the conclusion that it was also obvious and continuing. The jury, therefore, apparently at least, found the very fact to exist which ordinarily gives the master a right to insist on and to enforce the defense of assumption of risk notwithstanding the promise to remedy or to repair the defect. True, the court did not state the proposition in the usual form, namely, that the plaintiff could not recover if the danger was so imminent and obvious that a man of ordinary prudence would have declined to continue to discharge plaintiff's duties in face of the danger, yet the defendant supplied that omission in its request which the court refused. In view, therefore, that the jury found that the danger was imminent—and there is no finding that it was not such—that an ordinarily prudent and careful man would not have declined to continue to discharge plaintiff's duties, the case, although the evidence was sufficient to warrant it, was not submitted to the jury upon all the elements of law that are involved in this case in view of the evidence. The court, therefore, erred in refusing the defendant's request and in not charging, in substance at least, as requested.

Appeal from Cache County, First District

In view of all the facts and circumstances the question of assumption of risk was therefore not properly submitted to the jury. The mere fact that the court defined assumption of risk in one of its instructions was, under the circumstances of this case, wholly insufficient to enlighten the jury upon that question.

Complaint is also made that the court erred in refusing others of defendant's requests. While the court might well have given one or two of defendant's other requests, yet no prejudicial error resulted from refusing them, since the case otherwise was sufficiently covered by the court's general charge.

Error is also predicated upon the ruling of the district court in permitting the plaintiff to answer a certain question propounded to him on direct examination. The plaintiff testified that by reason of the injury to his eye he was unable to obtain employment as a stationary engineer; 6 that he applied to the general manager of the defendant for work some time after the injury, but was refused employment. Plaintiff's counsel then propounded the following question:

"What was said with reference to your ability to do the work, and in particular with reference to your eyesight?"

The witness answered:

"Mr. Merrill said they did not feel safe with me in the boiler room with my vision in that condition; the company had talked the matter over and concluded that."

Defendant's counsel objected to the question upon the grounds that it was hearsay and incompetent, etc. The court overruled the objection, and permitted the witness to answer as before stated, and defendant's counsel have assigned the ruling as error. In support of their contention counsel cite *Meyers v. S. P., L. A. & S. L. R. Co.*, 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1229; also in 39 Utah, 198, 116 Pac. 1119; *Idaho F. Co. v. Firemen's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586; 2 Jones, Com. Ev. (Blue Book), sections 357, 358. In defense of the ruling plaintiff's counsel cite *Webb v. Smith*, 6 Colo. 366; 2 Wharton's Ev., section 1177.

While it no doubt was proper for the plaintiff to show that he was unable to obtain employment, yet it is very clear from the record that that was not the purpose for which the question was propounded to the witness.

The purpose of the question was to prove the seriousness of the injury to the eye, and that the general manager of the defendant considered it so months after the accident. If plaintiff's counsel merely sought to prove that plaintiff was refused employment, the declarations of the general manager were wholly unnecessary. The general manager was neither qualified nor authorized to make admissions respecting the seriousness of plaintiff's injury at the time and under the circumstances shown in the record. His declarations outside of the scope of his employment were not admissible against his principal, the defendant. The principle which controls under such circumstances is fully discussed in *Meyers v. S. P., L. A. & S. L. R. Co.*, supra, and in the section from *Jones, Ev.*, supra. Moreover, a mere cursory reading of the authorities cited by plaintiff's counsel discloses that they are not in point here. We desire to add in this connection, however, that if this were the only error we, in view that there was no dispute regarding the accident and character of plaintiff's injury, should not feel inclined to reverse the judgment upon that ground alone. In view, however, that the case must be remanded for a new trial on other grounds, we deem it fair to give the trial court the benefit of our views upon that assignment.

There is no merit in the contention that the evidence was insufficient to carry the case to the jury. That question is conclusively settled by the Supreme Court of the United States in the case to which we have referred, where the facts and circumstances were in effect like those in the case at bar.

The judgment is reversed, and the cause is remanded to the district court of Cache County, with directions to grant a new trial. The defendant to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

Original Application for Writ of Mandamus

**BOARD OF EDUCATION OF SALT LAKE CITY v.
HANCHETT et al.**

No. 3130. Decided August 28, 1917. (167 Pac. 686.)

SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOLS—TAXATION—ASSESSMENT—“AND.” Comp. Laws 1907, section 1936, as amended by Laws 1915, c. 115, provides for taxes for school purposes based on statement and estimate of the boards of education, and that the tax for schools in cities of the first class shall not exceed $6\frac{1}{2}$ mills on the dollar on any taxable property per annum, and shall not exceed $2\frac{1}{2}$ mills additional in any year for the purchase of school sites and erection of school buildings. The section was also amended by chapter 111, approved on the same day, which declares that the tax for the support of schools and the purchase of school sites and erection of school buildings in cities of the first class and in cities of the second class, having an assessed valuation of \$20,000,000 or more, shall not exceed in any one year $3\frac{1}{2}$ mills on the dollar on any taxable property. *Held*, that while punctuation may be disregarded for the purpose of ascertaining legislative intent, yet as the word “and” is a conjunction implying addition, the conjunction in chapter 111 cannot be disregarded so that the limitation on assessed valuation will be construed as applicable only to cities of the second class, but it must be taken as applicable to a city of the first class, and hence the section is unconstitutional as to such cities and the limitation prescribed does not apply.¹

Original application by the Board of Education of Salt Lake City for a writ of mandamus against Lafayette Hanchett and others, commissioners of Salt Lake County, and others.

WRIT ISSUED.

Cheney, Jensen & Holman for plaintiff.

Richard Hartley, Co. Atty., and *R. B. Porter, Asst. Co. Atty.*, for defendants.

FRICK, C. J.

The board of education of Salt Lake City, hereinafter called plaintiff, filed its application in this court praying for an alternative writ of mandate against Lafayette Hanchett,

¹ *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1019.

Charles F. Stillman, and Joseph Lindsay, constituting the board of county commissioners of Salt Lake County, and against Thomas Homer, clerk, A. H. Parsons, assessor, Raymond C. Naylor, treasurer, and M. C. Iverson, auditor of Salt Lake County, hereinafter styled defendants, to require them to levy the taxes according to the statement and estimate made by the plaintiff for the support and maintenance of the schools of Salt Lake City for the year 1917, as provided by Comp. Laws 1907, section 1936, as amended by chapter 115, Laws Utah 1915, p. 210, or to show cause why they do not do so. An alternative writ was duly issued to which the defendants appeared and filed a general demurrer, which was ably argued by respective counsel, and the case has been submitted on said demurrer. The statute last above referred to reads as follows:

“The board of education shall, on or before the first day of May of each year, prepare a statement and estimate of the amount necessary for the support and maintenance of the schools under its charge for the school year commencing on the 1st day of July next thereafter; also the amount necessary to pay the interest accruing during such year, and not included in any prior estimate, on bonds issued by said board; also the amount of sinking fund necessary to be collected during such year for the payment and redemption of said bonds; and shall forthwith cause the same to be certified by the president and clerk of said board to the officers charged with the assessment and collection of taxes for general county purposes in the county in which the city is situated, and such officers, after having extended the valuation of property on the assessment rolls, shall levy such per cent. as shall, as nearly as may be, raise the amount required by the board, which levy shall be uniform on all property within the said city as returned on the assessment roll; and the said county officers are hereby authorized and required to place the same on the tax roll. Said taxes shall be collected [by the county treasurer as other taxes are collected], but without additional compensation for assessing and collecting, and he shall pay to the treasurer of said board, promptly as collected

Original Application for Writ of Mandamus

who shall hold the same subject to the order of the board of education; provided, that the tax for the support and maintenance of such school [s] in cities of the first class shall not exceed in any one year six and one-half mills on the dollar upon all taxable property of said city, [and shall not exceed] two and one-half mills additional on the dollar in one year, to be used exclusively for the purchase of school sites and the erection of school buildings; and in cities of the second class, the tax for the support and maintenance of such schools shall not exceed in any one year ten [twelve] mills on the dollar upon all taxable property in said city."

The section just quoted was, however, also amended by chapter 111, Laws Utah 1915, both of which were approved on the same day. The material part of the amendment last referred to, and the only part that is in question here, reads as follows:

"Provided, that the tax for support and maintenance of such schools, and for the purchase of school sites and for the erection of school buildings in cities of the first class and in cities of the second class, *having an assessment valuation of twenty million dollars or more*, shall not exceed in any one year three and one-half mills on the dollar upon all taxable property of said city; and in cities of the second class, having an assessed valuation of less than twenty million dollars, the tax for the support and maintenance of such schools, and for the purchase of school sites, and the erection of school buildings shall not exceed in any one year three and seven-tenths mills on the dollar upon all taxable property of said city."

We remark, this is a companion to the case of *Board of Education v. Hunter*, 48 Utah, 373, 159 Pac. 1019, where we ordered a peremptory writ of mandate against the county officers of Weber County under precisely the same circumstances, except that in that case the schools of Ogden City, which is a city of the second class, were involved, while in this case the schools of Salt Lake City, a city of the first class, are involved. In the Hunter Case we have stated the facts on which the writ was based, and have there set forth at

large our reasons for granting the same, which reasons we shall not repeat in this opinion.

It is conceded by the defendants that in this case the schools of Salt Lake City are affected by the $3\frac{1}{2}$ mills limitation precisely as the schools of Ogden City were affected by the limitation provided for in the proviso we have set forth above. In other words, it is conceded that the schools of Salt Lake City cannot be maintained and kept open for a period of nine months, and that said city will be prevented from participating in the "high school fund" referred to in the Hunter Case, *supra*, if the $3\frac{1}{2}$ mills limitation is enforced as defendants threaten to and will do if not prevented. In the Hunter Case we held that, for reasons there stated, the $3\frac{1}{2}$ mills levy, as limited in the proviso we have quoted above, was unconstitutional and void, and hence not enforceable. While the defendants concede that the Hunter Case was correctly decided, and that it was properly held in that case that the limitation of the $3\frac{1}{2}$ mills was void, yet they contend that the phrase we have put in italics does not apply to cities of the first class, but is limited to cities of the second class, like Ogden City. It is contended that the words in italics refer to cities of the second class only, and hence there is no limitation respecting the "assessed valuation" in cities of the first class, but the only limitation respecting cities of that class is the $3\frac{1}{2}$ mills mentioned in the proviso. We cannot so interpret the proviso. We cannot see how, under any rule or canon of construction, cities of the first class can be excluded from the phrase we have put in italics and at the same time how those cities can be included in the limitation of the $3\frac{1}{2}$ mills mentioned in the proviso. Counsel for defendants ingeniously argues that if the punctuation be changed by placing the comma after the word "class" following the word "first" instead of where it is after the words "second class," such a result follows. In that connection counsel also argues that punctuation is no part of a statute and may be disregarded. No doubt punctuation may not be permitted to affect or to defeat the legislative intention or to make that obscure which otherwise would be

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clear. Courts, in order to enforce the real intent of legislative enactments, very frequently not only change the punctuation, but, if necessary, will ignore it altogether. Punctuation may, however, be resorted to as an aid in ascertaining the legislative intent, and where such is the case courts may not, and do not, arbitrarily ignore punctuation, but will give it due consideration and effect. If the punctuation in the proviso as it now is were entirely eliminated, however, the meaning of the italicized phrase would still be precisely what it is with the punctuation as it stands. Defendants' counsel, however, suggests that the comma after the words "second class" should be advanced and should be placed after the words "first class," so that the punctuation would be: "In cities of the first class, and in cities of the second class having an assessed valuation of twenty million dollars or more," etc. In our opinion if the punctuation were thus changed the phrase we have just quoted would just as clearly include cities of the first class as it is now clear that they are included. As we view it, under any rule of construction, as the language now stands, the \$20,000,000 valuation applies to the cities of the first class just as clearly as it does to cities of the second class; and, further, if it be held that the \$20,000,000 valuation does not apply to cities of the first class, then it must also be held that the $3\frac{1}{2}$ mills limitation applies only to cities of the second class and not to cities of the first class. If the latter should be held to be the meaning of the phrase, then the schools in the cities of the first class would not be affected, since a sufficient levy can be made under another limitation which would then apply. We are, however, forced to the conclusion that both the \$20,000,000 limitation and the $3\frac{1}{2}$ mills limitation were intended to, and do, apply to cities of the first class as well as to cities of the second class, to which it was held in the Hunter Case, *supra*, they applied.

Let us pause a moment and see what is meant by the word "and" following the words "first class." "And" is there used in the sense of addition. That is, adding something to what has just been written. "And" is used in the same sense as it is used in the sentence, "5 and 7 are 12." That is,

when 7 units are added to 5 units the two produce the result, 12. Cities of the second class are therefore added to cities of the first class, and both, when taken together, come within the limitation of \$20,000,000 valuation and likewise come within the limitation of the $3\frac{1}{2}$ mills levy. The cities of the first class having a valuation of \$20,000,000 or more, and all the cities of the second class having a like valuation, therefore, constitute one class which is affected by the $3\frac{1}{2}$ mills limitation, while all other cities of the second class having a lower valuation constitute the class which is affected by the 3.7 mills levy. Had it been intended to prevent the above limitation from applying to cities of the first class, it could easily have been done by using apt language. As the language now stands, to our minds there is no escape from the conclusion that the limit applies to cities of the first class precisely as it was held in the Hunter Case that it applied to cities of the second class.

Counsel for defendants concedes that if that shall be our conclusion, then the result in this case must be the same as it was in the Hunter Case. Counsel for plaintiff have, however, presented a very forcible argument that the limitation is unconstitutional and void for other reasons. While the argument presented upon that phase of the case is very interesting, to say the least, yet, in view of the conclusion reached, it is not necessary for us at this time to pursue the subject farther. We are all agreed that no other construction is permissible than the one we adopted in the Hunter Case and which we are again forced to adopt in this case.

From what has been said, therefore, it follows that the limitation of $3\frac{1}{2}$ mills cannot be enforced as against Salt Lake City, which leaves in force the limitation found in Comp. Laws 1907, section 1936, as amended by chapter 115, Laws Utah 1915, which we have quoted in full. We remark that the words and phrases we have put in brackets are omitted from the section as it is printed in the laws of 1915, but they are included in the act as passed by the Legislature. We, therefore, have copied the section as it was adopted.

Appeal from Salt Lake County, Third District

It follows, therefore, that the demurrer should be, and it accordingly is, overruled, and that a peremptory writ of mandate should issue as prayed for by plaintiff in its application. Such is the order.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

FARNON v. SILVER KING COALITION MINES CO.

No. 3025. Decided August 30, 1917. (167 Pac. 675.)

1. **MASTER AND SERVANT—PLEADING—COMPLAINT—SUFFICIENCY.** A servant's complaint alleging defendant's corporate capacity, its ownership of the mine, the employment of plaintiff, his place of work, the location of the shaft in which the cage was operated, its relation to plaintiff's place of work, the purpose of the cage, how it was operated by the engineer, the employment of the engineer, his duties in respect to the cage and the persons being carried therein, the carelessness of defendant company in failing to employ a competent engineer; and, finally, the carelessness and negligence of both the engineer and the company in operating the cage while attempting to convey plaintiff to his place of work, together with the consequent injury to him and his claim for damages—is sufficient. (Page 298.)
2. **MASTER AND SERVANT—INJURIES TO SERVANT—VICE PRINCIPAL.** An engineer whose duty was to operate a mine hoist carrying miners to and from a lower level was, as to such miners, a vice principal, for whose acts the operator was liable. (Page 299.)
3. **MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING.** It is not objectionable to charge both the mine owner and a hoist operator with negligence in injuring a minor by dropping the hoist, the hoist operator being a vice principal. (Page 299.)
4. **MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANT.** An engineer whose duty was to operate a mine hoist carrying miners to and from a lower level was not, as to a miner injured by the negligent dropping of the cage, a fellow servant. (Page 299.)
5. **MASTER AND SERVANT—QUESTION FOR JURY—HAPPENINGS OF ACCIDENT.** (Page 299.) Though it is not strictly a case of *res ipsa loquitur*, it is negligence as a matter of law for an engineer operating an electrically operated hoist cage in a mine to forget to set the clutch when he releases the brake whereby the cage was suffered to drop by its own weight, and the weight of its cargo, a vertical depth of 110 feet to the injury of a miner therein. (Page 299.)

Farnon v. Silver King Coalition Mines Co., 50 Utah 295

6. DAMAGES—AGGRAVATION. Where the servant's broken leg was set, but in his delirium the cast was broken, and the bones could not be reset without loss of the leg, and a new cast was put on without the bones being in apposition, the amount awarded the servant should not be diminished because of anything the physicians did or failed to do. (Page 301.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by James Farnon against the Silver King Coalition Mines Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Dickson, Ellis, Ellis, & Schulder and Marioneaux, Stott & Beck for appellant.

Weber & Olson for respondent.

THURMAN, J.

The respondent, a miner, was severely injured while in the employment of defendant corporation in one of its mines in Park City, Utah. His place of work was on the 600-foot level of what is known as the Alliance Tunnel. His mode of ingress and egress to and from his place of work was by means of a vertical double compartment shaft extending from the 500-foot level downward in which a cage was operated by an engineer employed by the defendant company. The cage was operated by means of an electric engine controlled and manipulated by the engineer, whose place of work was on the 500-foot level, about thirty feet from the top of the shaft. A cage was connected with the engine by a steel cable, and it was the duty of the engineer, by means of the engine, to lower and raise the cage as might be necessary for the purpose of carrying men to and from their places of work on the lower levels of the mine. The cage in its downward course was controlled by the engineer by means of a brake and clutch. When the men were in the cage and ready to be lowered, they would give a signal to the engineer, who would release

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the brake and simultaneously set the clutch. The clutch prevented the cage from dropping to the bottom by its own weight. On the date of the accident in which the plaintiff was injured, he and another miner entered the cage on the 500-foot level for the purpose of being lowered to the 600-foot level, their place of work. They gave the signal to the engineer, who immediately released the brake, and, according to his own admission, forgot to set the clutch. The result was, the cage, by force of gravity, suddenly dropped to and upon a bulkhead constructed across the shaft at a point ten feet below the 600-foot level. The cage dropped by its own weight and the weight of its cargo a vertical distance of 110 feet, and, necessarily, fell with tremendous impact upon the bulkhead below. The plaintiff was severely injured in the fall. His left leg was fractured between the knee and hip about the middle of the long bone. His foot was crushed and lacerated on the bottom, and his whole side, clear up into the shoulder, was bruised, contused, and had begun to become discolored, due to extravasation of blood in the tissues, at the time the physician made his first examination. Plaintiff was taken to the hospital in Park City and treated for his injuries. After he had been there for several days, by some means unexplained, the cast, which had been used by the physicians in setting his limb and holding the broken bones in apposition so that the ends would knit together, became displaced and pushed down. The upper part of the leg became out of place. The bones, instead of being in apposition, lapped over. A new cast was put on the leg in that condition. No weight was attached or used on account of his nervous condition and the expressed fear of the attending physician that he would be more likely to lose his leg. The injury to the plaintiff was permanent. He brought this action to recover damages. The case was tried to a jury, and a verdict rendered in his favor. The defendant corporation appeals and assigns numerous errors, but relies mainly on the following:

“The court erred in overruling appellant’s objection made at the trial to any evidence being received in this action on the ground that the plaintiff failed to state a cause of action.”

"The court erred in giving to the jury the following portion of instruction No. 6: 'The court instructs you in this case, as a matter of law, that the dropping of the cage in the manner shown by the undisputed evidence in the case occurred through the negligence of the defendant Johnson, and that for such negligence both defendants Johnson and the Mining Company are equally responsible to the plaintiff. * * *'"

"The court erred in giving the jury the following portion of instruction No. 13: 'The amount you are to award the plaintiff should not be diminished because of anything the physicians did or failed to do.'"

"The court erred in refusing to give to the jury the appellant's request No. 1, which was as follows: 'The court instructs the jury that under the undisputed evidence in this case the engineer Johnson was a fellow servant of the plaintiff, and that the defendant Silver King Coalition Mines Company is therefore not liable to the plaintiff for the injury which he sustained, and your verdict must be in favor of the defendant Mining Company.'"

The proposition of appellant relied on in its first assignment of error, that "the complaint fails to state a cause of action," will now be considered. The complaint, in substance, alleges: (1) Defendant's corporate capacity; (2) its ownership of the mine; (3) the employment of plaintiff; (4) his place of work; (5) the location of the shaft in which the cage was operated; (6) its relation to plaintiff's place of work; (7) the purpose of the cage; (8) how it was operated by the engineer; (9) the employment of the engineer; (10) his duties in respect to the cage and the persons being carried therein; (11) the carelessness of defendant company in failing to employ a competent engineer; and, finally, the carelessness and negligence of both the engineer and the company in operating the cage while attempting to convey plaintiff to his place of work, together with the consequent injury to him and his claim for damages. Not a single element of a good complaint against both defendants is omitted, although it may not be perfect in form as against objections made by a hypercritical pleader seeking

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for technical defects. Plaintiff had the right to charge as many acts or omissions constituting negligence as, in the mind of the pleader, the circumstances warranted, and to rely upon one or all, according to the facts, without being subject to the charge of switching from one theory to another.

The defendant Johnson, under the allegations of the complaint, was a vice principal of the defendant corporation, and was employed to do work which could only be done by the company; and the company was responsible for the manner in which he did it, and could not, even if it 2, 3 desired, evade the responsibility or shift the burden to the shoulders of another. Hence the negligence of Johnson was also the negligence of the company, and the charge against both was therefore not objectionable from the standpoint of good pleading. Taking from the jury, for failure of proof, the charge of negligence in employing the engineer, did not and could not affect the other allegations charging both defendants with negligence in operating the cage. This assignment of error is manifestly without merit.

In this connection we may as well consider the trial court's refusal to instruct the jury as requested by the defendant, that the engineer Johnson and the plaintiff were fellow servants. This refusal of the court is assigned as error, but it is doubtful if appellant relies on it, inas- 4 much as it is barely referred to in the argument. What we have already said in this opinion practically disposes of this question also. The relation of the parties to each other and to the company, the nature of their work, and the places where they worked, rendered it impossible for them to have been fellow servants under any theory of the law as declared by our statute. This assignment, therefore, cannot be sustained.

But it is assigned as error, and urged with much force, that the trial court erred in instructing the jury as matter of law that the dropping of the cage in the manner shown by the undisputed evidence in the case occurred through the negligence of the defendant Johnson, and 5 that for such negligence both defendants, Johnson and

the mining company, were equally responsible to the plaintiff. We have taxed our mentality in a conscientious endeavor to prepare a proper instruction that could have submitted this matter to the jury as a question of fact. Every instruction we have been able to conceive of, if given, would have been manifest error against the plaintiff.

While this is not a case of *res ipsa loquitur*, it is just as conclusive, and, if possible, more convincing and satisfactory, as proof of the fact.

The defendant Johnson was the company's engineer. His duty, as disclosed by the record, was to operate the cage for the purpose of carrying men and material to and from the lower workings of the mine. If the engineer kept control of the cage by properly using the brake and clutch, there was little or no danger. If, by inattention to these simple details, he lost control, disaster would result. His mind was not engrossed by attention to other duties. It was a position of grave responsibility, but the duties pertaining to it were so simple and free from complications as to render it almost impossible to fail in a proper performance of them, except through a want of care constituting negligence. The plaintiff, as before stated, on the occasion of the accident entered the cage to be lowered into the mine. The signal to lower was given to the engineer in the usual manner. He released the brake, but did not set the clutch. The result was inevitable. The cage, in which were the plaintiff and a fellow laborer, suddenly dropped to a depth of 110 feet, and, in the language of plaintiff's companion, who was a witness, "smashed into the bulkhead" below. The plaintiff was, as before stated, severely injured. The only excuse offered by the engineer for failing to set the clutch was that "it slipped" his "mind"; in other words, he forgot it. He forgot to perform one of the most important duties that was ever imposed by a master upon a servant. There is no possible excuse in law for such neglect. The instruction of the trial court was, in effect, the only proper instruction that could have been given under the undisputed facts. It therefore became a question of law, and the court did not err when it

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took it from the jury. Labatt, Master and Servant (2d Ed.) vol. 4, p. 4995; Cyc. vol. 38, p. 1534, note 34, and cases cited.

There is but one question remaining to be disposed of, but the zeal and earnestness of appellant's counsel in maintaining the validity of their contention on this point implies a conviction which calls for a careful examination of the question. In its fifth assignment of error appellant charges that the court erred in giving to the jury the following portion of instruction No. 13: "The amount you are to award the plaintiff should not be diminished because of anything the physicians did or failed to do." Whether this instruction was valid or invalid depends, of course, upon the facts and circumstances of the case and the law applicable to such facts, rather than upon propositions of law applicable to a different state of facts. 6

As already stated, after plaintiff was taken to the hospital his injuries were dressed by the physicians. The ends of the broken bones of his leg were brought together in apposition so they would knit. The leg was then placed in a plaster cast. Other treatment was administered, but it is not pertinent here. After he had been in the hospital for several days under treatment, the attending physician was called to the hospital and found that the cast had been pushed down on the leg. The upper part of the leg was not in position. The attending physician called in another physician. They put a new cast on the leg and put the patient to bed without any weights on the limb. They decided if they put weights on they might lose the foot and the lower part of the leg. His nervous condition would not allow the use of weights, as the weights would be pulled one way or the other and he would be more likely to lose his leg. Instead of the bones being in apposition, as they were when first set, they had become displaced about two inches. They tried to replace the bones, but could not do it. They put on a new cast while the leg was in that condition. It would have required considerable force to pull the bones into position. They would have done more injury to the leg below than the overlapping of the bones would cause.

The foregoing is the substance of the testimony on that point of the attending physician, Dr. Browning. Upon the point that the limb could not be restored to apposition and weights put on under the circumstances, this testimony is corroborated by Dr. LeCompte, the assisting physician. The testimony also strongly tends to show that for several days before the cast became loose and displaced, and at about that time, plaintiff was more or less delirious, unconscious, and restless. There was also some evidence to the effect that plaintiff had indulged in intoxicants and became intoxicated. Appellant contends that this accounts for the condition he was found in when the cast became displaced; that while in a state of intoxication he himself removed the cast and thus became responsible for the increased injury. Respondent denies that he became intoxicated, and attributes the displacement of the cast to his unconscious movements while in a delirious condition. The court, by its instruction, fairly submitted this question to the jury. He instructed them to the effect that the plaintiff could not recover for increased injury caused by his own willfulness or negligence. The verdict of the jury is therefore conclusive against appellant's contention that any increased injury to the plaintiff was due to his own willfulness or negligence.

This brings us back to the particular question under review, Did the court err in instructing the jury that the damages to be awarded the plaintiff should not be diminished by anything the physicians did or failed to do? The question arises, What did the physicians do to increase the injury? As far as the record discloses, they did nothing that could have had that effect. They found the plaintiff in a certain condition, for which they were not in any sense responsible. They found him with the cast slipped down and the broken bones lapping one over the other. They did their best, under the circumstances, according to their testimony. They put on a new cast in the condition the limb was in without effecting an apposition of the broken bones, and without attaching weights to the limb. This, they concluded, would be impracticable and exceedingly dangerous. So far from doing anything to

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increase the injury, what they did was a distinct benefit, and left the limb in better condition than they found it.

The next question is, What did the physicians fail to do that increased the injury? This question has already been answered. The testimony tends to show that all was done that could be done without making matters worse. We have the uncontroverted opinion of Dr. Browning and Dr. LeCompte, graduates of medical colleges and physicians of standing and repute. If their professional opinions as to what could be done, or what should have been done under the circumstances, were incorrect, they ought to have been controverted and the truth made to appear. But they were not, and their testimony and professional opinions stand in the record as uncontroverted facts. Unless, therefore, the law is such that a party who is responsible for an original injury may, nevertheless, be relieved from responsibility for an aggravation of that injury by accidental means, we cannot conceive how appellant in the case at bar can escape liability for whatever injuries the plaintiff has sustained. It is necessary, therefore, to give due consideration to the authorities cited by appellant in support of its contention.

Appellant cites the following cases: *Secord v. St. Paul, M. & M. Railway Co.* (C. C.) 18 Fed. 221; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. Rep. 313; *Eighmy v. Union Pacific Railway Co.*, 93 Iowa, 538, 61 N. W. 1056, 27 L. R. A. 296; *York v. Chicago, Milwaukee & St. Paul Railway Co.*, 98 Iowa, 544, 67 N. W. 574; *Atchison, T. & S. F. R. Co. v. Zeiler*, 54 Kan. 340, 38 Pac. 282; *South Florida R. Co. v. Price*, 32 Fla. 46, 13 South, 638; *Union Pacific R. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; 4 L. R. A. (N. S.) 66, subdiv. 4; notes 17 L. R. A. (N. S.) 1168; *Texas Central Railway Co. v. Zumwalt*, 30 L. R. A. (N. S.) 1206; 40 L. R. A. (N. S.) 486.

Secord v. Railway Co., supra, is similar to the case at bar only in respect to the form of action. The plaintiff sought to recover damages for a personal injury. The question as to increased injury on account of negligence of the physicians

arose incidentally during the progress of the case, the same as in the present case. The opinion is merely instructions to the jury rendered by a federal district court during the trial of the case, and is subject to the criticism made by respondent, that it is not an opinion by an appellate court or on motion for a new trial, where opportunity is afforded for a deliberate exercise of calm and enlightened judgment. But, in addition to this, the case is one in which the court submits to the jury two questions of fact, namely: (1) Whether or not the plaintiff himself was guilty of contributory negligence; and (2) whether or not the attending physician selected by the company was negligent in his treatment and the injury to the plaintiff was thereby increased. In either case, if answered in the affirmative, the court states the law to be that plaintiff could not recover. But as we have shown in the present case, the jury, by its verdict, found the plaintiff was not guilty of either willfulness or negligence, and the undisputed facts show the physicians were not. In our judgment, respondent concedes too much when it admits that the Second Case supports appellant's contention.

In *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Sullivan*, supra, the plaintiff sued the defendant direct for damages incurred by the alleged malpractice of a company physician in amputating his arm while treating him for an injury to his hand, which occurred while engaged in coupling cars on defendant's railroad. The physician administered chloroform to the plaintiff under promise to him that he would not amputate his arm while under its influence. The original injury was apparently lost sight of entirely. There was no claim for damages on that account. The court held that if the defendant in that case used reasonable care in selecting a competent physician it was not responsible for his acts or omissions. This seems to be the law in a case of that kind, but it has no application to the facts of this case.

In *Eighmy v. U. P. Ry. Co.*, supra, the plaintiff, a brakeman, while coupling cars on defendant's road, had his hand crushed between the bumpers of the cars. He sued for damages on two counts—one directly for the injury occurring in the accident;

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the other for negligent treatment by the company physician. On the first count the special verdict of the jury went far towards establishing plaintiff's contributory negligence. The jury returned a general verdict for plaintiff for \$1,500 damages. This is another case in which the court held that the duty of defendant was discharged when it selected a reasonably competent physician, and that in such case it was not responsible for his negligence. It is not necessary for us to express an opinion as to whether or not we approve that opinion. It is sufficient to say it has no application in a case where, as matter of law, the court is able to say the physician was not negligent.

York v. Chicago, Milwaukee & St. Paul Ry. Co., supra. In this case the plaintiff's intestate was injured in a collision and was treated by a physician selected by the company. The injury proved fatal. Plaintiff sued for damages. The case was tried by a jury. At the close of the evidence the court directed a verdict for the defendant. Damages were claimed both on account of the accident and the negligence of the physician. Having found that the defendant was not liable for the accident, the court applied the ordinary rule that defendant was not liable for the negligence of its physicians if it used ordinary care in selecting reasonably competent persons.

Atchison, T. & S. F. R. Co. v. Zeiler, supra. In this case plaintiff's intestate was injured in a railroad accident on defendant's railroad and subsequently died. The action was for both the original injury occurring in the accident and for negligent treatment by the physician. As to the original injury, defendant was held not liable, as the injury resulted from the negligence of a fellow servant. On the question of negligent treatment by the physician, the court held in accordance with the usual rule; there being no allegation or proof that the physician employed was not competent or skilled in his profession, the company could not be held liable for his negligence.

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Union Pacific R. R. Co. v. Artist, *supra*. The question to be decided in this case is thus put by the learned judge who rendered the opinion:

“Was the company liable for the malpractice of the physicians or the carelessness of the attendants at the hospital, if that hospital was maintained as a charitable enterprise and not for the purpose of deriving profit from it?”

The court decided it was not. The question put and determined by the court shows that the case has no application here.

The case and notes in 17 L. R. A. (N. S.), 30 L. R. A., and 40 L. R. A. (N. S.) shed no light whatever on the question now under review. They are generally to the same effect as the cases we have examined.

In view of the facts found and opinion expressed before commencing a review of these cases, it was perhaps unnecessary to devote the time we have to their consideration. Our excuse for so doing has been promoted by a desire to make our position as clear and free from doubt as possible. Finding, as we do from the record before us, that the increased injury to the plaintiff was not due to his own negligence or willfulness, or to any intervening efficient cause, it follows as a matter of law, that it must be attributed to the original injury resulting from the negligence of the defendant. This being the view of the court, it is not necessary to review the authorities cited by respondent or the other assignments of error.

The judgment of the trial court is affirmed, respondent to recover costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

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BADGER COAL & LUMBER CO. v. OLSEN et al.
. (JACOB, Intervener.)

No. 3048. Decided September 10, 1917. (167 Pac. 680.)

1. **MECHANICS' LIENS—ENFORCEMENT OF LIEN—PARTIES.** Under Mechanics' Lien Law (Comp. Laws 1907, sections 1372-1400), any person who claims a mortgage or other lien on premises on which mechanics' liens are sought to be foreclosed in an action in equity may be made a party and his right to claim a lien may be litigated.¹ (Page 311.)
2. **MORTGAGES—MECHANICS' LIENS—PRIORITY.** Where the purchaser of lots gave a blanket mortgage limiting the amount on any one lot to \$350, and began erection of a dwelling house on one lot for which petitioners furnished materials, and the mortgagee released the lot from the blanket mortgage and took two new mortgages in a sum approximating the value of the house and the lot, such transaction was not a renewal of the old mortgage, but was done for the purpose of securing increased security on the old debt, and therefore mechanics' liens acquired prior to the taking of the second mortgage were superior to such mortgage. (Page 313.)
3. **MECHANICS' LIENS—FORECLOSURE—SURPLUS—MORTGAGES.** After the satisfaction of the mechanics' liens the mortgagee was entitled to any surplus, and it was error to decree that he had no right or interest in the land. (Page 315.)

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action by the Badger Coal & Lumber Company against N. C. Olsen and wife and another, wherein Emil H. Jacob intervened.

From the degree rendered, defendant T. P. Terry appeals.

REMANDED, with directions to modify.

George Halverson for appellant.

C. R. Hollingsworth for respondent.

¹ *Cain v. Parfitt*, 48 Utah, 81, 158 Pac. 448.

FRICK, C. J.

The Badger Coal & Lumber Company, hereinafter called company, commenced this action against the defendants N. C. Olsen and Marie Olsen to foreclose a mechanic's lien on premises owned by said defendants. T. P. Terry, hereinafter called appellant, was made a party to the action upon the alleged ground that he claimed "some estate or interest" in the premises on which the company claimed the mechanic's lien, but it was further alleged that the said claim was "without any right whatever." The Olsens did not appear in the action. In order to bring in all other mechanics' lien claimants the appellant duly published the notice required by Comp. Laws 1907, section 1391. Pursuant to such notice, one Emil H. Jacob appeared in the action and filed an answer and cross-complaint, in which he set up a mechanic's lien against the Olsens and the property in question.

The appellant demurred to plaintiff's complaint. The demurrer was overruled, whereupon he filed an answer, in which he set up two notes, one for \$675, dated December 15, 1914, and one for \$500, dated February 6, 1915, which notes were secured by two mortgages on the premises on which the mechanics' liens aforesaid were claimed, and which mortgages are dated the same as said notes; and he prayed judgment for the amount of the two notes, that his mortgages be declared superior to the mechanics' liens, that the same be foreclosed and the premises sold, that the proceeds of such sale be first applied to the payment of said notes and mortgages, and for general relief.

The facts found by the court, briefly stated, are that the appellant, on August 24, 1914, was the owner of a certain parcel of real estate in Ogden City, Weber County, Utah, which real estate is fully described; that on said day he sold, and by proper deed conveyed, said real estate to the defendant N. C. Olsen, who, with his wife, Marie Olsen, on the date last aforesaid, executed and delivered six certain promissory notes to the appellant, five of which were for \$1,000 each, and the sixth was for \$1,200, aggregating the sum of \$6,200, which was the consideration or purchase price Olsen agreed to pay for said real estate; that on said date, to secure

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the payment of said six notes, said Olsens duly executed and delivered a mortgage to the appellant in which they mortgaged all of said real estate for the purpose aforesaid; that said mortgage contained the following:

“It is hereby mutually agreed by and between the parties herein that the first parties are to subdivide the above-described mortgaged premises into lots; the second party, his heirs or assigns, agrees to make a partial release of this mortgage as to any lot included therein, at the request of the first parties, and upon the payment to the said second party, his heirs or assigns, the following sum of money for the lots designated, as follows: The sum of \$200 for each of the west ten lots contained in the above-described tract of land, and the sum of \$350 each for all other lots contained in the above-described tract of land. The size of said lots to be as follows: All lots south of Eighth street and fronting thereon to be 42 feet in width; all lots north of Eighth street and fronting thereon to be 44.33 feet in width.”

The court further found that, pursuant to the foregoing agreement, Olsen subdivided said real estate into 39 lots, and numbered them from 1 to 39 inclusive; that in the fall of 1914 said Olsen commenced the construction of a dwelling house on lot 10, being one of said 39, which is the particular lot in question here, and on which said mechanics' liens are claimed and on which said two mortgages for \$675 and for \$500, respectively, were given by said Olsens; that between November 12 and December 31, 1914, said company, under an express agreement with said Olsen, sold and delivered materials which were used in the construction of said dwelling house, amounting to the sum of \$352.35; that said company duly complied with the provisions of the mechanics' lien statute of this state, and is entitled to a mechanic's lien on said lot 10, together with the improvements thereon, for said sum of \$352.35; together with legal interest, and for \$25 as an attorney's fee; that between November 7 and December 29, 1914, said Emil H. Jacob, under an express agreement with said Olsen, performed labor on said dwelling house amounting to the sum of \$115; that said Jacob has complied

with all the provisions of the mechanics' lien statute of this state, and is entitled to a mechanic's lien on said lot 10 and the improvements thereon for said sum of \$115, together with legal interest, and \$25 as an attorney's fee; that on December 15, 1914, the appellant duly released said lot 10 from said mortgage of \$6,200, which release was duly recorded on December 17, 1914; that on December 15, 1914, said Olsens executed and delivered to said appellant a note for \$675, with 10 per cent. interest, and on the same date executed and delivered to him a mortgage for \$675 on said lot 10 to secure the payment of said note; that said mortgage was duly recorded on December 17, 1914; that on February 6, 1915, said Olsens also executed and delivered to said appellant a note for \$500, with 10 per cent. interest, and on said date executed and delivered a mortgage for \$500 on said lot 10 to secure the payment of said note, which mortgage was duly recorded February 18, 1915. The court also found that there "was no consideration whatever passing from said defendant Terry to the defendant Olsen for the note and mortgage of \$675." A finding in the same words was also made with regard to the \$500 note. The court further found:

"That said promissory note of \$675 and said mortgage securing the same, and said promissory note of \$500 and the said mortgage securing the same, so given by the defendant N. C. Olsen and his wife to the defendant Terry, were not renewals, or renewal of part thereof, of the said original indebtedness of \$6,200, referred to herein. Said notes of \$500 and \$675, or either thereof, or any part thereof, in any way representative of or continuing the said original indebtedness of \$6,200, owing by the defendant N. C. Olsen and his wife to the defendant Terry."

The appellant, however, testified, and his testimony is not disputed, that he had released two of the \$200 lots for which he had received nothing from the Olsens. The appellant, however, did not claim that the two notes and mortgages for \$675 and for \$500, respectively, were given as a consideration for the release of said lots. Indeed, it is clear from appel-

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lant's testimony that the two notes and mortgages aforesaid were given for another purpose entirely.

The findings go into great detail, but the foregoing synopsis covers the substance of the material parts.

The court made conclusions of law in which it found that the mechanics' liens of the company and of Jacob were superior to the two mortgages of the appellant. The court entered a decree accordingly, in which it ordered said lot 10, together with the improvements thereon, sold, and the proceeds applied in payment of said mechanics' liens, with interest and attorneys' fees as before stated. The court, however, expressly decreed:

"It is hereby further ordered, adjudged, and decreed that the defendant T. P. Terry has no estate, right, title, or interest whatever in and to the tract of real property hereinafter described, or any part thereof, and that said defendant is forever enjoined and debarred from asserting any estate, right, title, or interest whatever in and to the said tract of real property or any part thereof, hereinafter described, adverse to the plaintiff and to said lien claimant Emil H. Jacob."

The appeal is from the decree aforesaid. As before stated, the appellant filed a general demurrer to the complaint, and in his first assignment of error he insists that the court erred in overruling said demurrer. In support of the assignment it is argued that the appellant is not a proper party to this action. It may well be doubted whether that objection can be raised by a general demurrer. Waiving that point, however, we have already held that under our statute any person who claims a mortgage or other lien on premises on which mechanics' liens are sought to be foreclosed in an action in equity may be made a party, and his right to claim a lien on the premises in question may be litigated in such an action. *Cain v. Parfitt*, 48 Utah, 81, 158 Pac. 448. We see no reason to change or modify our ruling in that regard. The complaint was not vulnerable to the demurrer for the reason that appellant's claim to or interest in the property in question was not more specifically stated. Enough was stated in the complaint to authorize the company

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to make appellant a party to the action. The court, therefore, did not err in overruling the demurrer.

Proceeding now to a consideration of the merits, we remark that while appellant's counsel assails some of the findings of fact, yet we have discovered nothing in them which is material to this decision which is not supported by ample evidence. The controlling facts are not in dispute, and the appellant must stand or fall on the facts that are not in dispute. In view that the controlling facts are not in dispute, the questions to be determined are questions of law rather than of fact.

Appellant's counsel, however, cites and relies on the doctrine stated by the author in 2 Jones on Mortgages, section 971, where it is said:

"When a new mortgage is substituted in ignorance of an intervening lien, the mortgage, released through mistake, may be restored in equity and given its original priority as a lien. This was done in a case where the holder of a first mortgage, in ignorance of the existence of a subsequent one on the premises, released his mortgage and took a new one. There was no evidence of mistake except such as might be inferred from the mortgagee's ignorance of the existence of the intermediate mortgage, and there was no evidence that he would not have made this arrangement had he known of this fact; but it was considered that although the court was not at liberty to infer facts not proved, yet that it was at liberty to draw all the inferences which logically and naturally follow from the facts proved; that it is not an act of reasonable prudence and caution such as men commonly use in the conduct of business affairs for one having a first mortgage upon property, without consideration or other apparent motive, to release it, and take a new mortgage subject to a prior lien of a considerable amount; and therefore it may be inferred that the mortgagee would not have made the release had he known of the intervening mortgage. A court of equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction."

The foregoing text is supported in the cases of *Shaffer v. McClosky*, 101 Cal. 576, 36 Pac. 196, *Young v. Shaner*, 73 Iowa, 555, 35 N. W. 629, 5 Am. St. Rep. 701, and *Bruse v. Nelson*, 35 Iowa, 157, and numerous other cases, which need not be referred to.

In our judgment, the undisputed facts in this case do not bring it within the foregoing doctrine. It must be remembered that the two notes and mortgages in question were not

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substitutes for the original notes and mortgage which were given for \$6,200. Nor was the release of lot 10 2 from the original mortgage made "in ignorance of an intervening lien." When the appellant released lot 10 from the original mortgage, he knew that the Olsens were erecting a dwelling on lot 10 and that they were obtaining both materials and labor therefor. He could easily have ascertained just what the facts were in that regard from both the company and from Jacob, but he did not take the trouble to ask them or either of them. He, however, testified that he took the two notes and mortgages because he thought the dwelling house that was being erected on lot 10 was well worth the aggregate of the two notes, namely, the sum of \$1,175. He therefore merely took the two notes and mortgages as an additional security for the \$6,200. Appellant was therefore attempting to obtain the benefit of the value of the dwelling house which was being erected on lot 10. No doubt if he had not inserted the clause in the original mortgage which we have set forth he would, as against the company and Jacob, have been entitled to the benefit of the dwelling house in any event, since his mortgage was of record when the materials were furnished, and the labor was performed, to the extent at least that the dwelling house was necessary to satisfy the original mortgage. In view, however, of the clause of the mortgage, which fixed a limit of \$350 on lot 10, appellant no doubt desired to cover the full value of the house, namely, the \$1,175, by taking the two additional notes and mortgages. Appellant, however, released lot 10 from the original mortgage with full knowledge that some one was furnishing materials and performing labor for and on said dwelling. In releasing lot 10 from the mortgage it was not done, as is usually the case, to substitute a new mortgage for the old one, which is released. But what appellant sought in this case to accomplish was to get \$1,175 additional security for the \$6,200 mortgage. The release of lot 10 was therefore not made "in ignorance of an intervening lien," nor was it made so as to substitute a new mortgage for the one that was released. It is apparent that this case

does not come within the rule stated in 2 Jones, *supra*, and in the cases before referred to.

Neither is the appellant seeking to have his original mortgage reinstated. What he is attempting in this action is to obtain the full benefit of the two mortgages which were made and delivered after the company and Jacob had acquired liens on lot 10. It is quite clear that if appellant's original mortgage were reinstated as to lot 10, then all he could claim as against the equities of the company and Jacob would be the \$350 on said lot. In view that they, under the law, acquired an interest in lot 10, they, in equity, could have paid the \$350 fixed in the mortgage to appellant, and then could have enforced their lien on any surplus remaining over and above that amount. Under the original mortgage that was all the claim appellant had on lot 10 as against the Olsens, and it likewise was all he had as against those claiming equities in lot 10 through or under the Olsens. The Olsens held the equity of redemption, which consisted of any excess over the \$350 limit fixed in the mortgage, and certainly the company and Jacob were entitled to the full value of that equity. As before stated, however, appellant released lot 10 entirely from the mortgage with full knowledge of the prevailing conditions respecting the improvements that were being made on said lot, and hence, in our opinion, his rights under the two new mortgages are inferior and subsequent to the rights of the mechanics' lien claimants precisely as the court concluded. We are not now passing on what would have been the result if the appellant had brought an action to have his original mortgage reinstated, or if he, in this action, were seeking to accomplish that result. In order, however, to do that, he cannot insist on the full benefit of his two new mortgages as against the equities of the company and Jacob. While, as against the Olsens, he could claim any additional security the new mortgage gave him, yet, as against the mechanics' lien claimants, he has no rights whatever by virtue of the two new mortgages, except as against any surplus that may remain after the mechanics' liens are satisfied.

While we have no doubt respecting the correctness of the foregoing conclusions, yet we are constrained to say that we have less hesitancy in arriving at these conclusions in this case for the reason that, in any event, appellant's rights will be protected to the same extent as though his first mortgage were in fact reinstated. If that were done, then, as we have seen, as against the equities of the mechanic's lien claimants, he would be limited to \$350 as to lot 10. He, however, testified that the dwelling alone is worth \$1,175. The two mechanics' liens, with attorney's fees, and without adding interest, amount to only \$517.35, or \$657.65 less than the conceded value of the dwelling without the lot. The appellant thus has not only the \$350, the value fixed on lot 10, but he also has a margin of \$657.65 on the house after the two mechanics' liens are satisfied. He thus has an excess of \$307.65 over what he would have if his original mortgage were reinstated and he were limited to the \$350 interest in lot 10 as provided in said mortgage. Of course, we do not vouch for the correctness of the foregoing figures, except that they are correct in accordance with the evidence. As a matter of course, he would not be limited to \$350 except in case all above that amount were necessary to satisfy the two mechanics' liens. After those liens were satisfied, he, as against the Olsens, would be entitled to the surplus if it were necessary to satisfy his \$6,200 mortgage. The other two mortgages did not increase appellant's rights, in view that the consideration for all the three mortgages does not exceed said \$6,200 and all are based thereon.

Appellant, however, also complains of the restrictive clause in the decree which we have quoted. Counsel for the company and for Jacob, however, contends that the decree is limited to the rights of the lien claimants. The language is, however, sweeping, and it is open to the objection that appellant has no rights whatever in or to lot 10. Of course, all the rights that the two lien claimants can assert against said lot as against appellant is to have their liens satisfied. When the mechanics' liens are satisfied, appellant is entitled to any surplus that may remain. If the

decree is to be construed otherwise, it is clearly erroneous. In view that, in any event, this case has to be remanded to the district court for enforcement, we have concluded to remand the same, with directions to the district court of Weber County to modify its conclusions of law and decree to the effect that lot 10, with the improvements thereon, be sold; that the proceeds derived therefrom be first applied to the satisfaction of the company's and Jacob's mechanics' liens, together with accrued interest and attorneys' fees allowed by the court, and costs; and that the surplus, if any, be then applied to the satisfaction of appellant's mortgages; and, subject to such modification, the findings of fact, conclusions of law, and decree are in all respects affirmed.

We remark that, in view that appellant has devoted nearly all of his abstract and brief to the proposition that the court erred in not declaring the two mortgages superior to the mechanics' liens, we deem it unfair to the mechanics' lien claimants to allow the appellant costs on this appeal. We also desire to add that, in referring to lot 10, we did so with the understanding that that lot is also described in the pleadings, findings of fact, and decree by metes and bounds. We deemed it unnecessary, however, to do more than to refer to said lot by its number, and in doing so, of course, have reference to the lot that is described by metes and bounds in the pleadings aforesaid.

The case is therefore remanded to the district court of Weber County, with directions to modify the conclusions of law and decree as hereinbefore stated, and when so modified to enforce the decree in accordance with law. Neither party to recover costs on this appeal.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

Appeal from Wasatch County, Fourth District

McEWAN et al. v. ANDERSON

No. 3021. Decided September 10, 1917. (167 Pac. 685.)

1. **APPEAL AND ERROR—DISMISSAL—GROUNDS.** That bill of exceptions was not settled in time is not ground for dismissal of appeal. (Page 318.)
2. **EXCEPTIONS, BILL OF—SETTLEMENT AFTER TIME.** The bill of exceptions being settled, without any extension of time, after the time allowed by statute therefor, and therefore without jurisdiction, is without any force or effect. (Page 318.)
3. **APPEAL AND ERROR—DISMISSAL—GROUNDS.** Appeal will be dismissed, the trial clerk certifying that no notice of or undertaking on appeal has been filed there, and no assignment of errors, abstracts, or briefs having been served or filed by appellant, though the transcript has been on file in the appellate court for nearly a year. (Page 318.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Condemnation proceedings by John H. McEwan and others against Johanna C. J. Anderson.

From the judgment defendant appeals.

APPEAL DISMISSED.

J. H. McDonald for appellant.

Jacob Evans and *G. P. Parker* for respondents.

FRICK, C. J.

In this case plaintiffs obtained a judgment in the district court of Wasatch County, Utah, condemning a small strip of ground owned by the defendant, amounting to 25/100 of an acre, over which to construct an irrigating ditch, and the defendant was awarded judgment for the value of the land taken, and also for damages to her land by reason of the construction of the ditch aforesaid. The defendant appeals from the judgment of condemnation, and also from the judgment awarding damages.

At the threshold we are met with a motion by plaintiffs to dismiss the appeal on two grounds: (1) that the pretended

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bill of exceptions was not settled in time; and (2) that no assignments of error, abstracts, or briefs have been served upon respondent.

The record filed in the case shows the following: Judgment was duly entered May 20, 1916; notice of appeal was served and service admitted October 16, 1916; transcript on appeal was filed in this court November 23, 1916. The objection that the bill of exceptions was not settled 1, 2 in time, which, however, is not a reason for dismissing the appeal, is nevertheless serious, because it involves the power of the district court to settle and allow the bill. The record shows that the judgment was entered May 20, 1916, and notice of entry thereof served on appellant's counsel on June 1, 1916. The bill of exceptions was settled and signed October 14, 1916. The bill was therefore settled four months and fourteen days after notice of entry of judgment was served, which is three months and fourteen days after it should have been settled under our statute. The district judge, in settling the bill of exceptions did so conditionally; that is, the record shows that he settled and allowed it, stating it in his own language, "provided the time for settlement of bill of exceptions has not expired." In view that no extensions of time to serve, settle, and sign the bill of exceptions were granted, the district court, under all of our decisions, was without jurisdiction or power to settle and allow the bill at the time he signed and allowed it, and hence the bill of exceptions filed in this case is without any force or effect. In view, therefore, that there is no bill of exceptions, all we can do is to examine into the pleadings, findings of fact, and judgment.

The findings of fact and conclusions of law are not attached to the transcript, but the original judgment or decree, as before stated, is made a part of it. Moreover the clerk of the district court of Wasatch County, where the case originated and was tried, certifies: "No notice of ap- 3
peal, nor undertaking on appeal, has been filed in my office." In addition to the foregoing, no assignment of errors, or abstracts, or briefs, have been served or filed by the appel-

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lant, although the transcript on appeal has been on file in this court since November 23, 1916, as before stated. In view of the foregoing state of the record, we have no alternative save to dismiss the appeal.

It is therefore ordered that the appeal be, and the same is, dismissed, at appellant's costs.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

STUDEBAKER BROS. CO. OF UTAH v. ANDERSON et al.

No. 2975. Decided September 10, 1917. (167 Pac. 663.)

1. **SALES—WARRANTY—LANGUAGE CONSTITUTING EXPRESS WARRANTY.** Where defendant applied to plaintiff for an automobile for use for the special purpose of carrying people to and from his hotel and the depot, stating that he possessed no knowledge concerning an automobile and would rely on plaintiff's representations, and plaintiff's salesman represented that they had just such a car as defendant wanted, and stated that they guaranteed it to be in perfect condition to go on the road for such purpose, there was an express warranty that the car would run, though it was a second-hand car. (Page 325.)
2. **SALES—RIGHT TO RESCIND—BREACH OF WARRANTY.** Though on breach of warranty of an automobile the buyer might have sued for the difference between the value of the car in the condition warranted and its value in the condition in which it was sold, he might rescind instead and recover back the purchase price. (Page 326.)
3. **SALES—RIGHT TO RESCIND—WAIVER.** A buyer did not waive his right to rescind the purchase of an automobile for breach of warranty that it would run by repeatedly taking it back for adjustment and repairs, where nothing more was intended than to offer the seller ample opportunity to put the car in condition so that it would run. (Page 326.)
4. **SALES—BREACH OF WARRANTY—RETURN OF GOODS—QUESTIONS FOR JURY.** Where there was a sharp conflict in the evidence as to whether the buyer of an automobile in returning it to the seller left it for further repairs or whether he left it because it would not run and do the work for which it was warranted, this was a question for the jury. (Page 327.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

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Action by the Studebaker Bros. Company of Utah against William Anderson and another.

Judgment for defendants. Plaintiff appeals.

AFFIRMED.

Marionaux, Straup, Stott & Beck for appellants.

Boyd, DeVine & Eccles and *Soren X. Christensen* for respondents.

APPELLANT'S POINTS

Our contention is that no warranty of condition was ever pleaded or proved by the defendants. The allegations of the complaint are, and the testimony of Mr. Anderson is, that the plaintiff "warranted and guaranteed the car to be as good as new and in perfect condition and fit for the use for the carrying of passengers to and from the New Grand Hotel at Salt Lake City, and in every way capable of doing the work for which it was intended."

To say that a second-hand car is as good as new and in perfect condition and fit for carrying passengers, and capable of doing the work for which it was intended, is nothing but the expression of an opinion and does not amount to a warranty. (*Morley v. Consolidated Manufacturing Co.*, 81 N. E. 993; *Warren v. Walter Automobile Co.*, 50 Misc. (N. Y.) 605, 99 N. Y. Supp. 396; *Motor Company v. McKenna*, 138 N. Y. Sup. 491; *Motor Company v. Osborne*, 140 Ill. App. 633; *Smith v. Bolster*, 125 Pac. 1022; *Milwaukee Rice Machinery Co. v. Hancock*, 115 Wis. 422, (91 N. W. 1010); 28 Cyc., page 44.) If there had been a warranty of condition by the seller, the buyers' remedy would have been an action for damages to recover the difference between the value of the car in the condition warranted and its value in the condition in which it was.

"Where the article furnished by the seller is not such in kind, quality or condition as it was expressly or impliedly warranted to be, the direct and natural loss to the buyer who keeps it is obviously the difference between the value of an article of the kind he was entitled to receive, and the value

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of the article which he has in fact received. For this loss he is entitled to compensation." (Mecham on Sales, Section 1817.)

"He is not entitled to return the property to the seller and rescind the agreement of sale." (Mecham on Sales, Section 1805.)

It is not necessary to cite any authority that if one has a right to rescind for breach of warranty of condition, he waives the right to rescind if, upon discovering the breach of warranty, he consents to the seller's repairing the property. Repairs or alterations under such circumstances is nothing less than making good the warranty. A purchaser who consents to the repair of the property impliedly assures the seller that if such repairs are made he will be satisfied. (*Gentilli v. Starace*, 30 N. E. 660, 14 N. Y. Sup. 764; *Aultman & Co. v. McKinney*, 26 S. W. Rep. 266; 35 Cyc., page 428; *Gaar-Scott & Co. v. Halverson*, 105 N. Y. 109; *Aultman Co. v. Donnell*, 60 Pac. Rep. 482.)

RESPONDENTS' POINTS

In the case of *Milwaukee Company v. Hancock*, cited by counsel, the court held that the representation that it "was as good as new in every point and particular" is an assertion of a physical fact amounting to a warranty upon which the purchaser may rely. Even in the absence of an expressed warranty that it is fit for a particular purpose, if the buyer informs the seller that he is buying it for a particular purpose, there is an implied warranty, a breach of which will justify a decision. (35 Cyc. 399, Subdivision iii, and authorities cited.) Here, however, there was a direct affirmation that the automobile was suitable for a particular purpose, and it became an express warranty. (*Clark v. Johnston & Company*, 42 S. W. 844 [Ky.]; *Young v. Natta*, 88 S. W. 123 [Mo.]; *Conkling v. Standard Oil*, 116 N. W. 822 [Ia.].) The rule of law as to the sale of automobiles is not different from that relating to any other class of personal property. The general rule as to the remedies of a buyer on a breach is as follows:

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"The remedy of the buyer for a breach of warranty in the sale of goods may be by a return of the goods, the contract being rescinded, and recovery of the price paid, by an action for damages or by a counter-claim or recoupment in an action by the seller for the price." (35 Cyc. 434 [Subdivision J].)

CORFMAN, J.

This was an action brought by the plaintiff in the district court of Salt Lake County to recover a balance due on a promissory note of the defendants given for the balance of the purchase price of an automobile. The complaint is in the usual form of an action upon a promissory note, alleging execution, delivery, and nonpayment on the part of the defendants and ownership of the note by the plaintiff. Briefly stated, the answer denies the execution and delivery of the note for a consideration; admits nonpayment; alleges that the note was obtained from the defendants by reason of fraud and deceit on the part of the plaintiff. For a further answer, and by way of counterclaim against the plaintiff, the answer affirmatively alleges that the plaintiff, on March 31, 1913, sold to the defendants a certain Garford automobile for \$1,400, the defendants then paying \$700 and giving their note for \$700; that at the time of the sale plaintiff warranted and guaranteed the automobile to be good as new, in perfect condition, and fit for the use of carrying passengers to and from the New Grand Hotel at Salt Lake City, and in every way capable of doing the work for which it was intended; that on April 1, 1913, the automobile was delivered to and received by the defendants, they relying on the said representations of the plaintiff; that upon receipt of the automobile, and after attempting to use it in a proper and workmanlike manner, the defendants found the automobile to be out of repair and incapable of being operated; that the defendants thereupon returned the car to the plaintiff and demanded a refund of the \$700 paid by the defendants on the purchase price. Defendants prayed for judgment against the plaintiff for \$700, with interest, cancellation of the note, and costs of suit. The plaintiff's reply, in effect, was a denial of

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all of the allegations of the counterclaim except that therein plaintiff admitted that the automobile was out of repair and alleged that it was returned to plaintiff for repairs and received by plaintiff for that purpose, and also alleged that the car was purchased by defendants as a second-hand automobile after they had tested it and concluded that it was a good bargain at \$1,400 with the exception of making such repairs as might be necessary to put and keep it in such condition as the defendants desired to have it. Trial was to a jury, resulting in a verdict for the defendants, upon which judgment was entered in defendants' favor as prayed for in their counterclaim. Motion for a new trial was made by plaintiff. The same was denied. Plaintiff appeals.

Plaintiff assigns as errors: The rulings of the court in the admission and rejection of testimony over plaintiff's objections; the refusal of the plaintiff's requests for a directed verdict in favor of plaintiff, and the denial of plaintiff's motion for a new trial on the grounds that the verdict of the jury was contrary to law, the evidence, and the instructions of the court. However, as the case is presented here on brief and argument of counsel, but one question is involved, namely, Is the verdict of the jury, and the judgment entered thereon, contrary to law and the evidence?

It was pleaded in the counterclaim of defendants that at the time of the purchase of the automobile in question plaintiff "warranted and guaranteed the said car to be as good as new and * * * fit for the use of the carrying of passengers to and from the New Grand Hotel at Salt Lake City, and in every way capable for doing the work for which it was intended." William Anderson, one of the defendants and manager of the Grand Hotel Company, the other defendant, relative to the car being guaranteed, testified as follows:

"March, 1913, I called on the plaintiff for the purchase of a car. I met Mr. Duffin. He was salesman for the company. I told him I was looking to buy a hotel bus or carryall, something to convey people to and from the New Grand Hotel and the depot. Mr. Duffin says: 'We have exactly what you want. Here is a car just—the engine in this car has just been over-

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hauled by ourselves, in their own shops, and we guarantee this car to be in perfect condition to go on the road just for such purposes as you want it.' And I told him there was no necessity for any demonstration as far as the engine was concerned, that the Studebaker's word was good enough for me, and I knew nothing about an engine anyway; I am not an expert with an automobile."

Duffin, the plaintiff's salesman, testified concerning the sale:

"The first conversation with Mr. Anderson, he came in and wanted to know if we had a car that would suit his purpose for hauling passengers from the hotel to the depot and back. I told him we had just such a car on the floor, * * * I told him the car had been recently overhauled and was in good condition. * * * Car was in good condition to do this work. * * * I didn't say to him we guaranteed the car to be as good as new. Never mentioned guaranty to Mr. Anderson or his chauffeur."

The evidence conclusively shows that immediately after the defendants purchased the car it would not run. It was taken back for repairs and adjustments at the plaintiff's place of business daily, and the plaintiff failed, after repeated efforts, to put it in condition so that it could be operated.

Further testimony was given by the defendant Anderson in regard to defendants returning the car to plaintiff:

"The car was finally taken back to the Studebakers. * * * I tendered the car back to Mr. Duffin, the man I bought the car from. * * * I did that when they refused to run it any more. * * * I said, 'Here is the car back, Mr. Duffin.' I says: 'It's no use for me to bother with this car any more. It won't run. * * *' I said that to Mr. Duffin that day we brought the car back and refused to take it any more."

Testimony was given by witnesses for the plaintiff tending to show that when the defendants last returned the car to the plaintiff it was left for further repairs to be made by the plaintiff; that it was repaired and put in running condition by plaintiff when the defendants refused to again receive it.

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It is contended by plaintiff that the expressions made by its salesman concerning the condition of the car, and its fitness for use were merely opinions of the salesman and, as a matter of law, did not amount to a warranty; and, further, there is no implied warranty attending the sale of a 1 second-hand or used automobile. Numerous cases are cited by plaintiff in support of plaintiff's contention. The cases cited by counsel and the case at bar can readily be distinguished. The mere fact that after the purchasers had received the cars and put them to use breakages occurred and evidence of wear were discovered rendering the cars unsatisfactory to the purchasers, those cases hold, was not a breach of warranty, express or implied. The case at bar presents an entirely different proposition. Here the defendants, according to the undisputed testimony, applied to the plaintiff for an automobile to use for a special purpose, "something to carry people to and from the New Grand Hotel and depot." The plaintiff's salesman met the defendants' application by representing it had just such a car, "We have exactly what you want. * * * We guarantee this car to be in perfect condition to go on the road for such purposes as you want it." We think from the foregoing statements made concerning the particular car in question something more was to be implied, as matter of law, than that the plaintiff could sell the defendants a junk pile for an automobile and then escape liability therefor by saying such statements were only "seller's talk." It is quite apparent that defendants' intent and purpose was to purchase an automobile that would run and carry passengers. The plaintiff represented and guaranteed it was selling the defendants just such a car. The car purchased by defendants would not run. That is conceded. The plaintiff, after repeated efforts, failed to make it run so as to meet the requirements for which it was sold and the plaintiff warranted it. It appears from the evidence that the defendants relied implicitly on the representations of the plaintiff's salesman that the car was in first-class condition for use, and that it would be a serviceable car for the carrying of passengers. The plaintiff was advised by defendant Anderson that he possessed

no knowledge concerning an automobile, and that he would rely on the representations of the plaintiff, as he expressed it, "Studebaker's word is good enough for me." So far as the record here shows there was nothing in the appearance of the car to show that it was otherwise than in perfect condition for service, or that it would not do the work the defendants expected to use the car for.

All the authorities recognize the right of the defendants to complain and have legal redress under such circumstances and conditions as attended the transaction between plaintiff and defendants. Whether the sale be of a new or a second-hand car the representations made by the plaintiff amount to no less than an express warranty. *Bouchet v. Oregon Motor Car Co.*, 78 Ore. 230, 152 Pac. 888; *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617; *International Harvester Co. v. Bean*, 159 Ky. 842, 169 S. W. 549; *Investment Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189; *Clark v. Johnston & Co.*, (Ky.) 42 S. W. 844; *International Harvester Co. v. Lawyer* (Okl.) 155 Pac. 617.

It is next contended by plaintiff that if there was a breach of warranty on the part of plaintiff, the defendants' remedy was an action for damages to recover the difference between the value of the car in the condition warranted 2 and the value in the condition in which it was sold. Undoubtedly the defendants had that remedy, but it was not the only remedy the defendants could invoke. As stated in 28 Cyc. 44:

"For a breach of warranty the vendee has the right to rescind the contract and recover back the purchase price, or he may retain the vehicle and hold the vendor for his damages." *Berry*, *Law Automobiles*, section 226; *White Automobile Co. v. Dorsey*, supra.

It is further contended by plaintiff that if the defendants returned the car to the plaintiff for repairs, it was implied, as a matter of law, that, upon proper repairs being made, the defendants would be satisfied with the car, and they 3 thereby waived their right to rescind the contract of sale, citing in support of that doctrine, *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660; *Aultman & Co. v. McKinney* (Tex. Civ. App.) 26 S. W. 266; 35 Cyc. 428; *Garr-Scott & Co. v. Halver-*

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son, 128 Iowa, 603, 105 N. W. 109; *Aultman & Co. v. Donnell*, 9 Kan. App. 813, 60 Pac. 482. It would serve no purpose to enter upon a discussion of these cases. The facts and circumstances held as constituting a waiver in the cases cited by plaintiff were very different from the case at bar. As it is stated in 35 Cyc. 428, cited in plaintiff's brief:

"Unless there is a definite condition to that effect, the buyer is not obliged, as a condition precedent to recover on the warranty, to allow the seller to remedy defects. * * * So too an unsuccessful effort to remedy the defects renders the seller liable on his warranty, and the buyer is not bound to allow him a second opportunity."

Again recurring to the testimony as disclosed by the record, James W. Duffin, plaintiff's witness and salesman who sold the car, testified that after the defendants received the car "it was brought back every day."

T. L. Davis, a witness for the plaintiff, and its employee for the purpose of operating cars, testified:

"Q. Well one of the great troubles of the car was you couldn't get it to do the work, wasn't it? A. That was the trouble. I tried to drive it up the hill going north past the police station and couldn't make it. I hadn't tried it up the hill before. This time I tried to make it go and it wouldn't go. Q. You reported back there was no use trying, you will have to have new parts? A. I didn't state the new parts. Q. What did you say? A. I said have to go to the shop; I didn't state as to new parts. Q. You just could not operate it, that was all? A. That was the whole thing."

At most the record shows the defendants intended nothing more by taking the car back to plaintiff so repeatedly for adjustments and repairs than to afford the plaintiff ample opportunity to put the car in condition so that it would run. This was not a waiver of defendants' legal right under their contract to hold the plaintiff to answer for selling them a worthless car. *Kloch v. Newbury*, 63 Wash. 153, 114 Pac. 1032.

Then again, the record shows there is a sharp conflict in the evidence as to whether or not the defendants in returning the car to plaintiff left it for further repairs. The defendant Anderson testified that he did not do so; that he left it because it would not run and do the work for which the

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defendants had purchased it and the plaintiff had represented and guaranteed it would do. We think this and the other questions involved in this controversy were properly submitted to the jury under the instructions of the trial court.

The jury having found the issues against the plaintiff, the judgment of the district court should be affirmed. It is so ordered. Costs to respondents.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

KENT et al. v. OGDEN, L. & I. RY. CO.

No. 3036. Decided September 10, 1917. (167 Pac. 666.)

1. CARRIERS—INJURIES TO PROSPECTIVE PASSENGER—WEIGHT OF EVIDENCE. While evidence respecting the surroundings at a crossing and that there was no light provided, or conveniences for passengers, is important, where there is a conflict in the evidence respecting the cause of an accident to a person waiting for a train at the crossing, or with regard to the conduct of the injured person, or where there are no eyewitnesses, where eyewitnesses saw just how the accident occurred and saw deceased just before and at the very moment the collision took place, their evidence was necessarily controlling. (Page 335.)
2. EVIDENCE—CONCLUSIVENESS ON PARTY INTRODUCING. Where the testimony of witnesses introduced by plaintiffs was uncontradicted, plaintiffs were bound thereby. (Page 335.)
3. CARRIERS—INJURIES TO PROSPECTIVE PASSENGER—PROXIMATE CAUSE. Where a person waiting for a train at a crossing stop crossed the track as the train was approaching, but remained so close thereto that she was struck by the train, the position carelessly assumed by her was the cause of her injury, and not any negligence of the company respecting the speed of the train or the dazzling brilliance of the headlight.¹ (Page 337.)
4. CARRIERS—INJURIES TO PROSPECTIVE PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. Where a person waiting for a train at a crossing stood so near the track as to be struck by the train, and while it was claimed that the headlight was brilliant and dazzling, it appeared that the rails of the whole track were visible

¹ *Wilkinson v. Railroad*, 35 Utah, 110, 99 Pac. 466; *Pratt v. Light & Ry. Co.*, 38 Utah, 500, 113 Pac. 1032; *Bates v. Railroad*, 38 Utah, 568, 114 Pac. 527; *Steggell v. Salt Lake & Utah E. Co.*, 50 Utah, —, 167 Pac. 237.

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to persons on the train from a point 700 or 800 feet from the crossing, and up to the instant deceased was struck, the court should not have submitted the question of contributory negligence to the jury, but should have granted a nonsuit or a directed verdict.¹ (Page 339.)

5. NEGLIGENCE—VARIANCE—CONTRIBUTORY NEGLIGENCE. While the plaintiff in a negligence case must recover, if at all, on one or more of the acts of negligence set forth in the complaint, yet in determining the question of contributory negligence the jury are not limited to the acts of negligence described in the complaint, but may consider any fact, inference, or circumstance disclosed by the evidence upon that subject. (Page 341.)
6. TRIAL—INSTRUCTIONS—SINGLING OUT EVIDENCE OR FACTS. In charging on contributory negligence the court should not undertake to name the specific things or acts which the jury may consider, but should merely tell the jury to consider the evidence upon that subject and determine the question from a consideration of the whole evidence. (Page 341.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Joseph B. Kent and others against the Ogden, Logan & Idaho Railway Company.

Judgment for plaintiffs. Defendant appeals.

REVERSED and REMANDED, with directions.

Boyd, DeVine & Eccles for appellant.

C. C. Richards and *A. A. Law* for respondents.

APPELLANT'S POINTS

The pleader must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recovery, and show that they occurred through or by the negligence of the defendant. It is not sufficient that the acts alone be stated, or that a general statement of negligence be alleged. The facts must be alleged, and it must be alleged that these facts constitute negligence. (Sutherland, Code pleading, Practice, and Forms, Section 233; *Rosenarn v.*

¹*Newton v. Railroad Co.*, 43 Utah, 219, 134 Pac. 567; *Gibson v. Utah, L. & T. Co.*, 46 Utah, 562, 151 Pac. 76; *Odwald v. Railroad*, 39 Utah, 245, 117 Pac. 46.

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Washington G. M. Co., [Cal.] 23 Pac. 1035; *Woodward v. O. Ry. & Nav. Co.*, [Ore.] 22 Pac. 1076; *McPherson v. Pac. Bridge Co.*, [Ore.] 26 Pac. 560; *Smith v. Buttner*, [Cal.] 27 Pac. 29.)

No statutory or municipal regulation governing the rate of speed at Anderson crossing, was shown by the plaintiff, and in the absence of such regulations we understand the law to be that the company had the right to use its discretion in establishing the speed of its trains. 33 Cyc. 971 and note 50, citing, *Reed v. Queen Anne's R. R. Co.* 57 Atl. 529 [Del.]; *Partlow v. Ill. Central R. R. Co.* 37 N. E. 663 [Ill.]; *Toledo, etc., R. R. Co. v. Smart*, 116 Ill. App. 523; *Boyd v. Chicago, etc., R. R. Co.*, 103 Ill. App. 199; *Landon v. Chicago, etc., R. R. Co.*, 92 Ill. App. 216; *Slater v. Utica R. R. Co.*, 88 N. Y. 42.) And when it is shown by the complaint or by the evidence of the plaintiffs that the proximate cause of the injury was due to the negligence of the injured person, there is nothing for the jury, and the court will, as a matter of law, adjudge the case in favor of the defendant. (*Pool v. S. P. Co.*, 20 Utah 210, 58 Pac. 326; *Clark v. O. S. L. R. R. Co.*, 20 Utah 401, 59 Pac. 92; *Pens v. Mining Co.*, 27 Utah 378, 75 Pac. 934; *Holland v. O. S. L.*, 26 Utah 208, 72 Pac. 940.)

It is the duty of an intending passenger at a crossing to take a position outside of the reach of the approaching car, and if he fails to do so, and is in a position of danger, nevertheless, the motorman has a right to assume that he will get out of the way, since it is common knowledge that a train or car usually passes one who has signaled it to stop so that he may enter at the rear. (*Wood v. Ry. C.* [Neb.] 120 N. W. 1121; *Neal v. Springfield, etc.*, [Mass.] 75 N. E. 702; *Griffiths v. Denver Co.* [Colo.] 61 Pac. 46; *Luitz v. Denver Co.* [Colo.] 95 Pac. 600; *Denton v. Ry. Co.* [Wash.] 88 Pac. 755; *Wright v. The Company* [Va.] 66 S. E. 848.)

RESPONDENT'S POINTS

By erecting the station board and marking it "Anderson" the defendant made the stopping point its station, or premises, for the purpose of receiving and putting off passengers. But whether it did or did not the defendant was under legal

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obligation to be on the lookout for the people it invited to go there to board its trains and to use reasonable and ordinary care to avoid injuring them while they were there. In the case of *Smalley v. Railroad Co.*, 34 Utah 448, this court said:

"It is but applying the general rule that, when one induces or invites another upon his premises, he must use ordinary care to avoid injuring him."

And in the case of *Brown v. Salt Lake City*, 33 Utah, 238, it was said:

"As against the mere intruders or licensees, the owner need not maintain his premises in a reasonably safe condition; but as to those who come upon them by invitation, express or implied, he owes the duty of reasonable care for their safety."

In declaring the law relative to negligence and contributory negligence, the Supreme Court of the United States in deciding the case of *Railway Company v. Ives*, 144 U. S. 428; 36 L. ed. 493, said:

"As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also, the question of whether there was negligence in the deceased, which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat the action, or perhaps more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other."

The *Ives* case has been cited, and the doctrine announced by it expressly approved and followed in a great many cases decided by this court, among which are the following: (*Pool v.*

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Sou. Pac. Company, 7 Utah 309; *Olsen v. Railway Company*, 9 Utah 129; *Smith v. Railway Company*, 9 Utah 141; *Woods v. Sou. Pac. Company*, 9 Utah 146; *Wines v. Railway Company*, 9 Utah, 232; *Jeffs v. Railway Company*, 9 Utah 374; *Riley v. Transit Company*, 10 Utah 428; *Dedricks v. Railway Company*, 13 Utah 41; *Lowe v. Salt Lake City*, 13 Utah 91; *Saunders v. Sou. Pac. Company*, 13 Utah 275; *Reese v. Mining Company*, 15 Utah 460; *Olson v. Railroad Company*, 24 Utah 472; *Jensen v. Railroad Company*, 44 Utah 116.)

In addition to the duty of the defendant to be on the lookout for intending passengers at the station board, the defendant's motorman was chargeable with knowledge that he was approaching a public highway crossing that was traveled by a large number of persons and teams, daily, and at all hours of the day. That there were no gates or gateman at the crossing and that travelers, either on foot or in vehicles, might be expected there at any time. Under such conditions it was his duty to keep a vigilant lookout for persons and vehicles as he approached the crossing and to so control his train, if necessary, as to avoid injuring any who might be there. (*Olson v. Railroad Co.*, 24 Utah 468-469; *Christensen v. Railroad Co.*, 29 Utah 204-205; *Young v. Clark*, 16 Utah 42; *Olson v. Railroad Co.*, 9 Utah 136-139.)

FRICK, C. J.

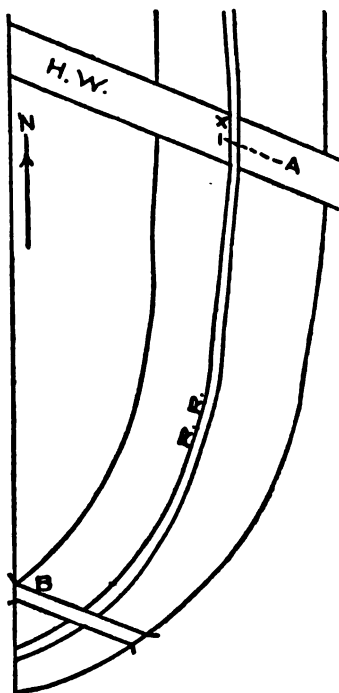
The plaintiffs recovered judgment against the defendant for damages for the death of one Mary Eveline Kent, wife of the plaintiff Joseph B. Kent and mother of the other plaintiffs named in the caption. The defendant appeals from the judgment. The principal errors assigned are, that the evidence fails to show negligence on the part of the defendant, and that the evidence conclusively shows that the deceased was guilty of contributory negligence as a matter of law, and that therefore the court erred in refusing to sustain defendant's motion for a nonsuit and also in refusing to direct a verdict for the defendant.

In the complaint it is in substance alleged that on the 27th day of October, 1915, about seven o'clock P. M., the deceased,

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while walking on a public highway waiting for a train on which she intended to proceed to her home in Logan, Utah, about five miles north from said crossing, was struck and killed by a train of cars operated on the defendant's inter-urban railway; that while the trains of the defendant stopped to take on and let off passengers at said railway crossing, called Anderson, yet the defendant had failed to provide any lights or other conveniences for the deceased in waiting for said train or in boarding the same; that the north-bound train was then past due, and while the deceased was waiting for said train "near said track in the darkness of the night, and supposing that she was a sufficient distance therefrom to avoid the possibility of colliding with the moving train," the defendant operated a train on its railway track aforesaid with a brilliant electric headlight, which dazzled and confused the deceased; that in approaching said crossing said train was operated at an excessive, dangerous, and negligent rate of speed, to wit, about 40 miles per hour; that "before the deceased could discover the peril she was in and remove herself therefrom, said train ran against, struck, and collided with said deceased," and she was instantly killed. It is also alleged that the train did not stop at the crossing, but ran by it at the speed aforesaid. The defendant denied all acts of negligence and pleaded that the collision was caused by the negligence of the deceased. The evidence is not very voluminous, and is without conflict. Indeed, the defendant introduced no evidence and relied entirely upon the evidence produced by the plaintiff. The following plat will assist the reader to understand the points hereinafter decided:

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The two curved parallel lines marked "R. R." on the plat indicate the railway track. The space marked "H. W." indicates the public highway which crosses the railway at a point commonly known as Anderson's crossing. The lines marked "B" indicate an overhead bridge across the railway track which is about 800 feet south from the highway crossing. The point marked "A" on the plat on the highway east of the railway track indicates where the deceased was first seen by two witnesses who were on the train and who were leaning out of the west car window as the train passed the point marked "B" on the plat. The point marked "X" on the highway indicates the place where the deceased was standing when she was struck by the front end of the train, and the broken lines leading from point "A" to point "X" indicate the course the deceased followed in crossing the track and in then turning north to the point "X," where, as before stated

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she remained standing. The parallel lines on either side of the track indicate the right of way fences. The crossing in question is a country crossing at which the defendant maintained no station building, but at which it, nevertheless, stopped its trains on signal to receive or to discharge passengers.

The deceased lived at Logan, Utah, and she had once or twice before the day of the accident boarded one of its trains at the crossing in question, and was familiar with the surroundings. On October 27, 1915, the evening in question, the train was due at the crossing going north at about 6 o'clock p. m. On that day the deceased visited her brother-in-law, who lived about three-quarters of a mile from the crossing in question, and who, at about 6 o'clock p. m., took her to the crossing in his buggy to meet the train. The train was late, however, and after waiting about three-quarters of an hour, he left the deceased there on the west side of the track and went home. The train arrived at the crossing at about 7 o'clock p. m., and was running at a speed variously estimated by the witnesses of from twenty-five to thirty-five miles an hour. It seems that the train operator did not intend to stop at the crossing on the evening in question.

There is much evidence respecting the surroundings at the crossing, and that there was no light provided or maintained there by the defendant, and that there were no conveniences provided for prospective passengers to get off or on the trains, etc. In cases where there is a conflict in the 1, 2 evidence respecting the cause of an accident, or with regard to the conduct of the person who is injured, or where there are no eye-witnesses who saw the accident, all of those matters are important; but in a case like this, where we have eyewitnesses who saw just how the accident occurred and who saw the deceased just before and at the very moment the collision took place, the evidence of the eyewitnesses is necessarily controlling. In this case two witnesses who saw the accident testified on behalf of the plaintiffs. Their testimony is uncontradicted in any particular, and therefore the plaintiffs are bound thereby. One George Maughan, a witness

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called by plaintiffs, testified that he was on the north-bound train on the evening in question; that the train was "about an hour late"; that there were two cars in the train, and he was sitting on the west side in one of them; that as the train came around the curve, at the point marked "B" on the plat, he leaned out of the west car window. His testimony, as recorded in the bill of exceptions, then proceeds as follows:

"Q. What did you see that attracted your attention, if anything? A. Well, I didn't see anything when I was right under the bridge. Q. As you came around it, what did you first notice? A. When we were turning the bend there was a light thrown around. I seen a lady there, standing there. She was right on the east side of the track, and the light struck her. She followed the light across the track. She got across the track all right. When she got on the west side of the track she was maybe right on the end of the ties right there, and she turned her head to the north. The light was facing her at the time the car hit her. Q. That is, she turned her face to the north? A. Yes, sir. Q. And her back to the south? A. Yes, sir. Q. You say that she was about at the end of the tie west of the west rail? A. Yes, sir. I think she was just about on the end of the tie, maybe standing right on the end of the tie, a little more out. * * * Q. I understood you to say when you first noticed her she was east of the track? A. Yes, sir. Q. And that she crossed over both rails and turned and looked north? A. Yes, sir. Q. Did you notice whether she was walking, started to walk after she had crossed the track? A. I believe that she either took one or two steps to the north. I think, as near as I could judge in the short time there was. Q. Then what did you notice? A. Why, I seen the car hit her."

This witness also testified that when the deceased took one or two steps to the north the train was "twenty or thirty feet, something like that, as near as I could tell" from the deceased. The witness further testified:

"Why, I know that when she nearly got to the track she put her hand in the light. She put her left hand up. She was then on the east side of the east rail, and was walking

west. She put it somewhere to her face or to her head. It was **the** hand nearest the train."

It **is** not necessary to quote the testimony of the other eye-witness, for the reason that there is no conflict in the testimony of **the** two, and the testimony of the other merely corroborates the **wit**ness we have quoted in so far as he testified to the same matters. The other witness, however, said that when he saw the deceased "she was standing erect with her back to the car"; that is, the approaching train. He further said that **at that** moment:

"I thought she was away [from the track] far enough for the car to miss her, but she happened to be close enough to be struck by the car."

The testimony showed that the deceased was forty-nine years of age, and was possessed of all her faculties.

Defendant's counsel contend that this is a case where, in view of the undisputed evidence, we must determine the question of the deceased's negligence as a matter of law. They further insist that the principle involved here is **3** the same as the one which controlled the three cases of *Wilkinson v. Railroad*, 35 Utah, 110, 99 Pac. 466, *Pratt v. Light & Ry. Co.*, 38 Utah, 500, 113 Pac. 1032, and *Bates v. Railroad*, 38 Utah, 568, 114 Pac. 527. In all of those cases it was held that no recovery could be had for the reason that the negligence of the plaintiffs in those cases was the proximate cause of the injuries complained of, and in view that the evidence was without conflict, it was the duty of this court to determine that question as a matter of law. In those cases the plaintiffs attempted to cross railway tracks without discharging the duty imposed upon them by law of listening or looking for approaching trains or cars. The only difference between those cases and the one at bar is that the deceased contemplated becoming a passenger, and that she was not injured while in the act of crossing the track, but was injured after she had crossed it by remaining or going too near the track. It is very clear from the testimony that the deceased saw the train approaching from the south, and was preparing to board it when it came to a stop. The inference to be

deduced from all the evidence is also very strong, if not conclusive, that the men in charge of the train did not intend to stop at the crossing in question on that trip, but intended to pass on northward. As before stated, the brother-in-law of the deceased left her on the west side of the track, but, for some unknown reason, she must have passed to the east side again after her brother-in-law had left her. At all events she was seen a few feet east of the track when the train was some 700 or 800 feet south of the crossing on which she was standing. The testimony is all to the effect that passengers get off and on trains from the west side of the track. The deceased therefore again passed to the west side to board the train. After having crossed the rails, however, she there turned to the north, and took one or two steps in that direction. She, therefore, did not pass beyond the danger zone of the approaching train, but as the witnesses say, she turned parallel with the track and stood facing north with her back turned to the approaching train. She, therefore, stood so near the track that the front car struck her and threw her "six or eight feet," as the witnesses put it, to the west of the track. In view that she had passed entirely over both rails and then turned to the north parallel with the track, it is not a case of being struck by a train while in the act of crossing the track, but it presents a case where a pedestrian has had ample time and opportunity to reach and to remain at a place where he is safe, but, nevertheless, places himself, carelessly, in a place of danger. We say carelessly because the evidence is beyond dispute that there was nothing to detract the deceased's attention and nothing to confuse her mind or to obscure her vision. Nor was she threatened with physical injury from diverse sources or causes. It is a clear case where the deceased placed herself so near a railway track that a passing train must of necessity come in contact with her person in passing along and over the track. If there is any difference in principle between this case and the three cases before cited, we fail to perceive it. If the deceased had stood upon the track under the circumstances here disclosed until she was struck, no one could, in reason, contend that the position which she carelessly assumed

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was not the proximate cause of her injury. If that be so, how can it reasonably be contended that the position which she carelessly assumed, so near the track as to be in the path of the passing cars, likewise was not the cause of her injury? Where one voluntarily assumes a position on or so near a railway track that a train of cars in passing on the track must necessarily strike him, can reasonable minds differ as to whether his act in so placing himself was the proximate cause of injury in case the cars strike him? We think not. What is there to differ about? It is physically impossible for one to escape injury if he remains either on or so near a railway track as to be in the path of a passing train of cars. Even children are aware of the danger under those circumstances. This case is not distinguishable from the case of *Steggell v. Salt Lake & Utah R. Co.*, 50 Utah, —, 167 Pac. 237.

The only remaining question, therefore, is, Is there anything in the evidence from which the jury could find an excuse for the conduct of the deceased in taking a position so near the railway track? Something is said by plaintiff's counsel about the brilliancy of the headlight. Under the 4 statute it was the duty of the defendant to provide its trains with headlights. Had it failed in that, the failure would have constituted negligence. But the evidence is conclusive that the rails of the whole track were visible at the point where the deceased was standing. The two witnesses saw the rails when they were 700 or 800 feet south of the crossing, and continued to see them up to the instant the deceased was struck by the car. What others saw she must be deemed to have been able to see. As pointed out before, there is nothing disclosed by the evidence which would excuse her conduct. This court, in a number of cases, has illustrated and applied the conditions and circumstances under which a jury may find an excuse for the deceased's conduct in determining the question of contributory negligence. See *Newton v. Railroad Co.*, 43 Utah, 219, 134 Pac. 567; *Gibson v. Utah L. & T. Co.*, 46 Utah, 562, 151 Pac. 76; *Oswald v. Railroad*, 39 Utah, 245, 117 Pac. 46. In the first two cases we went as far as permissible to go in permitting a jury to pass upon the

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question of contributory negligence. In the last case cited we held that the plaintiff was prevented from recovering upon the ground of contributory negligence as a matter of law. In those cases it is held that so long as there is any question of fact upon which reasonable minds may differ and arrive at different conclusions in determining the question of negligence or contributory negligence, the question is for the jury, but when there are no facts or circumstances which would authorize reasonable minds to differ, the question becomes one of law. When, as in this case, there can be no doubt whatever regarding the proximate cause of the accident, nor any doubt that it was wholly within the power of the deceased at any moment before the collision to have averted it by merely moving a foot or two out of the zone of danger, this court cannot shirk its duty in determining the result. Before a judgment for damages can be sustained there must be some act, either of commission or omission, on the part of the defendant in the action constituting negligence, and it must not appear as a matter of law that the plaintiff's own conduct caused the injury and consequent damages. If no negligence is shown on the part of the defendant, or if it appear as a matter of law that the plaintiff's inexcusable negligence caused the injury and damages, then to allow a judgment for damages to stand would be equivalent to transferring property from one person to another without sanction of law, and hence without right. In this case it is quite immaterial whether the defendant was guilty of any or of all of the acts complained of since all of those acts, taken either singly or in combination, merely constituted the ultimate, while the deceased's inexcusable conduct constituted the proximate cause of the injury. The district court erred, therefore, both in refusing to grant defendant's motion for a nonsuit and in refusing to direct the jury to return a verdict in favor of the defendant as requested by the defendant.

A number of the court's instructions are also assailed. Those that are more especially complained of were given by the court on its motion upon the question of contributory negligence. The court, in its instructions on that sub-

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ject, enumerated various things which it told the jury 5, 6 they might consider in determining the alleged contributory negligence of the deceased. Counsel insist that the court erred in that regard by enumerating things not contained in the plaintiff's complaint. While it is true that the plaintiff in a negligence case must recover, if at all, on one or more of the acts of negligence set forth in his complaint, yet, in determining the question of contributory negligence, the jury are not limited to the acts of negligence described in the complaint, but they may consider any fact, inference, or circumstance disclosed by the evidence upon that subject. The only criticism to which the court's instructions upon that subject are open is that the court undertook to name specific things or acts which the jury might consider in determining contributory negligence. It is always dangerous for a court to single out specific things or acts in charging the jury. If, in doing that, some acts or things that are material should be omitted, the instructions would be vulnerable to attack, and might require a reversal of the judgment. The court should merely tell the jury to consider the evidence in the case upon that subject, and from a consideration of the whole evidence to determine the question of negligence or contributory negligence, as the case may be. We do not hold that the instructions complained of in this case constitute reversible error, but we do hold that the instructions should not have been given in the form they were given.

There is no reversible error in the other assignment relating to the giving of instructions and in refusing the requests of the defendant. Nor did the court commit error in the admission of the evidence complained of.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Cache County, with directions to grant a new trial. Costs to appellant.

MCCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

N. Y. Blower Co. v. Carbon County H. S. et al., 50 Utah 342

NEW YORK BLOWER CO. v. CARBON COUNTY HIGH SCHOOL et al.

No. 2985. Decided September 10, 1917. (167 Pac. 670.)

1. SCHOOLS AND SCHOOL DISTRICTS—CONSTRUCTION OF BUILDING—REQUIREMENT OF BOND—LIABILITY. Though Laws 1909, c. 68, section 1, provides that any person, contracting with the state, or any village or school district, for the construction of any public building, or for any public work or improvements, or for repairs upon any public building or improvement, shall be required, before commencing such work, to execute a penal bond for the faithful performance of said contract, and that such contractor or contractors shall promptly make payment to all persons supplying labor and material in the prosecution of the work under such contract, a school district is not liable to parties supplying labor and material for failure to require the bond. (Page 345.)
2. SCHOOLS AND SCHOOL DISTRICTS—CONSTRUCTION OF BUILDINGS—REQUIREMENT OF BOND—LIABILITY. Under such statute the boards of trustees are not personally liable for failure to require the bond. (Page 345.)

Appeal from District Court, Seventh District; *Hon. A. H. Christensen*, Judge.

Action by the New York Blower Company against the Carbon County High School and others.

Judgment dismissing the action. Plaintiff appeals.

AFFIRMED.

Skeen Bros. and *J. A. Howell* for appellant.

Thurman, Wedgwood & Irvine, *L. O. Hoffman*, *M. P. Braffet* and *F. Ericksen* for respondents.

FRICK, C. J.

The plaintiff, in its complaint, in substance alleged that the Carbon County High School, hereinafter called high school, was a public corporation, and that the individual defendants, hereinafter designated defendants, constituted the board of trustees of said high school; that prior to October 15, 1912, said high school entered into a contract with the

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Wright-Osborn Company, hereinafter called contractor, for the construction of a high school building at Price, Carbon County, Utah; that in accordance with the terms of said contract, and pursuant to the laws of this state, said contractor agreed to perform all the labor and furnish all the materials necessary to complete said high school building; that, relying on said contract, the plaintiff sold and delivered to said contractor certain materials, of the value of \$767, all of which were used in the construction of said high school building, no part of which has been paid to the plaintiff; that the said high school and said defendants failed to require said contractor to enter into a bond, with good and sufficient sureties, conditioned that the contractor would promptly pay all persons who should perform labor and furnish materials for said high school building as required by the laws of this state. There are other allegations, relating to the filing of a petition in bankruptcy against said contractor, and that it was adjudged a bankrupt before said building was fully completed, and that there were no funds arising out of said contract to pay plaintiff's claim or any part thereof.

The high school and the defendants appeared in the action and filed separate demurrers to the complaint, upon the ground that the same does not state facts sufficient to constitute a cause of action against any of the defendants named in the title of the action. The district court of Carbon County sustained the demurrers, and, the plaintiff electing to stand upon its complaint, judgment was entered dismissing the action. The plaintiff appeals, and now insists that the district court erred in sustaining the demurrers, and each of them.

The only reason plaintiff assigns why the court erred in sustaining said demurrers is that both the high school as a corporation and the individual defendants, constituting said board, are liable to the plaintiff for the materials furnished, because they failed to require the contractor to execute a bond, with sufficient sureties, conditioned that it would promptly pay all persons for labor performed and materials furnished and used in the construction of said high school

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building, as provided by chapter 68, section 1, Laws Utah 1909, which so far as material here, reads as follows:

“Any person or persons entering into a formal contract with the state, any state institution, county, city, town, village, or school district, for the construction of any public building, or the prosecution and completion of any public work or improvements, or for repairs upon any public building, public work, or improvement, shall be required before commencing such work to execute a penal bond, with good and sufficient surety or sureties, for the faithful performance of said contract, with the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying labor and material used in the prosecution of the work provided for in such contract; and any person, company, association, or corporation who has furnished labor or material used in the construction or repair of any public building, public work, or improvement, payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the obligee on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon subject, however, to the priority of the claim and judgment of the obligee therein.”

Plaintiff's counsel insists that both the high school as a corporate entity and the defendants as individuals are liable, for the reason that they have failed to perform a duty imposed by statute, which was to be performed for plaintiff's benefit. Counsel have cited a number of cases in which liability was imposed, either upon the school district or upon the school trustees, for failing to comply with statutes similar to the one quoted above. Indeed, in *Northwest Steel Co. v. School District*, 76 Or. 321, 148 Pac. 1134, L. R. A. 1915F, 629, Ann. Cas. 1917B, 1086, the school district was held liable under a statute which in terms was just like ours. After due consideration, however, in the case of *Joseph Nelson Supply Co. v. Leary*, 49 Utah, 493, 164 Pac. 1047-1051, we refused to follow or be bound by the decision in the Oregon case, and we there held that under our statute the school

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district was not liable to those who have performed labor or furnished materials to the contractor for failing to require it to execute the bond mentioned in the statute. We there set forth our reasons why we refused to hold the school district liable under the provisions of our statute, and it is not necessary to repeat the reasons here. While in that case it was also contended in argument that the individuals constituting the board of trustees were also liable, yet, as was pointed out, the trustees were not made parties to that action, and for that reason we did not pass upon the question of their liability under our statute. That question is, however, now squarely presented.

The liability of school trustees has frequently been before the courts under statutes in some respects similar to ours. In most instances, however, the statute, in explicit terms, imposed the duty either upon the school district or upon the trustees to require the bond, while in our statute, as pointed out in *Joseph Nelson Supply Co. v. Leary*, supra, it is not directly imposed on any one except the contractor. In Michigan, where the duty is directly imposed, it has been held by a divided court that the individual trustees were liable for failing to require such a bond. *Owen v. Hill*, 67 Mich. 43, 34 N. W. 649; *Plummer v. Kennedy*, 72 Mich. 298, 40 N. W. 433. Upon the other hand, the Supreme Courts of Minnesota and of Kansas, under statutes similar to the Michigan statute, arrived at opposite conclusions. *Ihk v. Duluth City*, 58 Minn. 182, 59 N. W. 960; *Freeman v. City of Chanute*, 63 Kan. 573, 66 Pac. 647. Similar statutes were also before the courts in *Pressed Brick Co. v. School District*, 79 Mo. App. 669; *Plumbing Supply Co. v. Board of Education*, 32 S. D. 270, 142 N. W. 1131; *Monnier v. Godbold*, 116 La. 165, 40 South. 604, 5 L. R. A. (N. S.) 463, 7 Ann. Cas. 768.

In all of the cases last cited, as well as in others that could be cited, the boards of trustees are held not liable to those who had furnished labor or materials, or both, for the construction of public school buildings. Nor upon sound reason and principle can we see why the defendants 1, 2 should be held liable under a statute like ours. To say

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the least, the duty is not cast upon either the defendants' or the high school in express terms to exact such a bond. It is quite clear from the statute, however, that it was intended that the contractor should execute such a bond. The statute, however, does not say that either the defendants or the high school shall require the contractor to execute such a bond. It is equally clear that under the statute neither the defendants nor the high school could compel such a bond, but the most that could be done in that regard would have been to refuse to enter into the contract unless or until such a bond was executed. The plaintiff could have refused to sell its materials to the contractor until a bond had been provided, and it was also within its power to demand that the defendants require such a bond from the contractor. If such a demand had been made, and the defendants had then willfully refused to require the contractor to execute such a bond, a different question would be presented.

Ordinarily, at least, where one claims that an officer is by law bound to do a particular thing for his benefit, he is required to make a demand before bringing an action against such officer. Such a demand would clearly be necessary in case the claimant desired to bring a coercive action against the officer. While it may not be necessary in all cases to make a demand upon an officer or upon a board to act before he or it, as the case may be, can be held liable for neglecting or failing to perform a duty imposed by law, yet, where, as in this case, a personal liability is sought to be imposed for failing to do an official act, it should be made to appear that the failure to perform the alleged act was willful or at least grossly negligent. If the Legislature had intended to impose a personal liability upon the defendants for failing to require the contractor to execute the bond mentioned in the statute, it would have been an easy matter to have indicated that intention in apt language. Not having done so, this court, upon whom is cast the ultimate duty of determining the legislative intent, should not import into the statute by construction that which is not fairly implied, where, as here the consequences are not only drastic, but under certain cir-

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cumstances might easily spell ruin for some of the individual trustees. Nor, as pointed out in *Joseph Nelson Supply Co. v. Leary*, supra, is such a construction necessary under our statute.

Under Comp. Laws 1907, section 1400x, the plaintiff had an adequate remedy by bringing an action against the high school before the money arising out of the contract was paid either to the contractor or on his order. The contractor was powerless to defeat the plaintiff's claim by making an assignment of the contract price to any one. In view of the terms of our statute, and in view of the authorities last above cited, we feel constrained to hold that the individual defendants are not liable. Nor, in view of the decision in *Joseph Nelson Supply Co. v. Leary*, supra, is the high school liable. For the reasons stated, therefore, the district court of Carbon County did not err in sustaining the demurrers and in entering judgment dismissing the action.

The judgment is therefore affirmed, with costs to respondents.

McCARTY, CORFMAN, and GIDEON, JJ., concur.
THURMAN, J., being disqualified, did not sit in this case.

BLAKE et al. v. BOSTON DEVELOPMENT CO. et al.

No. 3077. Decided September 10, 1917. (167 Pac. 672.)

1. ACTION—JOINDER OF CAUSES—PARTIES AND INTERESTS INVOLVED. In an action by stockholders against a corporation and its officers and directors, the complaint alleged various illegal and wrongful acts by the officers and directors, whereby V., who, it was alleged, controlled and dominated the corporation and its business affairs, had acquired its property and stock and a note executed by the corporation in his favor, and that they had levied a number of illegal assessments on the stock of the corporation. It prayed for an injunction against the sale of the stock to pay one of such assessments, and that all of the assessments be set aside and annulled, and that the officers and directors make a full and complete accounting of all the assets and stock of the corporation, and that the note in question be surrendered, canceled, and annulled. *Held*, that the complaint improperly joined causes of action in favor of the corporation against the officers and

directors and causes of action in favor of plaintiff against the corporation, since, notwithstanding the alleged control of V. over the corporation's officers and directors, the causes of action to annul and enjoin the assessments were causes of action in plaintiff's favor against the corporation, while the causes of action based on the wrongful acts of the officers and directors were causes of action in its favor, though enforced by the stockholders on its behalf. (Page 353.)

2. **PLEADING—SEPARATE STATEMENT—DISTINCT CAUSES OF ACTION IN ONE COURT.** The complaint also improperly joined in a single statement separate and distinct causes of action in favor of plaintiffs and against the corporation, as each assessment was a completed transaction, and if wrongful a separate and distinct cause of action, and the corporation was entitled to have each assessment stated separately in order that it might interpose any defenses it might have. (Page 353.)
3. **PLEADING—SEPARATE STATEMENT OF CAUSES.** In an action by a corporation or its stockholders against its officers who have been derelict, mismanaged its affairs, and wrongfully appropriated its property, wrongful acts charged against the same individuals may, as a rule, be incorporated in one statement in the complaint regardless of how numerous or how involved the alleged wrongs may be, as the wrong consists in appropriating the property rights of the corporation, and that wrong constitutes but one cause of action. (Page 356.)

Appeal from District Court, Third District; *Hon. George F. Goodwin*, Judge.

Action by Thomas W. Blake and others against the Boston Development Company and others.

Judgment dismissing the action on demurrer. Plaintiffs appeal.

AFFIRMED.

Skeen Bros. for appellants.

Smith & McBroom for respondents.

FRICK, C. J.

Thomas W. Blake originally commenced this action. In his complaint he alleged that he brought the action "for him-

self and for all other stockholders and creditors of the Boston Development Company," a corporation. The action was brought against said company, and against Fred H. Vahrenkamp, R. B. Garff, Thomas Austin, R. H. Winder, B. F. Fitzgerald, and Samuel Stillman who, it was alleged, "are now, and during the times hereafter mentioned have been the directors and officers of said corporation, having the complete management and control of its business affairs," and who will hereinafter be designated officers and directors. Various matters are set up in the original complaint, to which the defendant corporation demurred, and the demurrer was sustained. An amended complaint was then filed by the plaintiff Blake, which, however, suffered the same fate. In view that Blake obtained leave of court to file another amended complaint, which superseded the first two, we need not refer to the first two complaints further. In the last complaint filed certain other parties, who claimed to be stockholders of said corporation, to wit, V. A. Kedney, Lewis T. Cannon, Edward Christiansen, Joseph Oborn, James Oborn, William Oborn, and D. A. Skeen, were added. They are styled interveners, but how and when they were permitted to intervene in the action the record does not disclose. We shall treat those so-called interveners as plaintiffs, since that is the real character they assume in the action. The last complaint is too voluminous to be set forth at length in this opinion. We shall state the substance of the last amended complaint as briefly as possible.

After again alleging the purpose of the action and that the individual defendants constituted the officers and directors of said corporation, it is alleged that all of the parties we have designated plaintiffs, including Blake, are stockholders, and that each one of them is an owner of a certain number of shares of the capital stock of such corporation, the exact number owned by each being stated, the aggregate number so owned amounting to 7,660 shares. It is alleged that the defendant Fred H. Vahrenkamp, the promoter of said incorporation at the time it was incorporated, transferred to it "three unpatented mining claims then not known and since

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demonstrated to be of no actual intrinsic value, in full payment of its entire capital stock of one hundred thousand (100,000) shares, all of which, excepting only four shares, was issued to the said Vahrenkamp"; that since said corporation was organized said Vahrenkamp has dominated and controlled all of its officers and directors, and through them he has controlled and directed its business affairs; that he, with the coöperation of said officers and directors, has grossly mismanaged the business affairs of said corporation; that said Vahrenkamp, acting on behalf of said corporation, obtained a lease and option to purchase certain mining claims; that he took the "title to said lease and option in his own name," and wrongfully and fraudulently failed to have said lease and option transferred to said corporation, and thereafter caused the authorized capital stock of said corporation to be increased from 100,000 shares to 500,000 shares by having the articles of incorporation amended to that effect, and that all of said stock was issued to said Vahrenkamp; that he has caused ore shipments from the property leased as aforesaid to be made in his own name, "without fully recognizing the interests of said corporation in said property or the proceeds of the sale" of said ores; that said Vahrenkamp has from time to time presented false and fraudulent claims against said corporation, and the officers and directors "have permitted the said Vahrenkamp to cause various and numerous large credits in his favor to be entered upon such books and records as were kept by said corporation"; that the officers and directors authorized the execution and delivery of a certain promissory note of said corporation for \$17,000 to said Vahrenkamp, which note "was issued without adequate or any consideration, and operates as a fraud upon the rights of the stockholders of said corporation"; that said Vahrenkamp and said officers and directors have failed and neglected "to keep proper and complete books and records" of the business transactions of said corporation; that said officers and directors have entered into a certain contract with a certain corporation and have concealed the same from the stockholders, which contract is alleged to be detrimental to the interests

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of the corporation; that the officers and directors have permitted a large amount of the treasury stock of said corporation to be issued to various individuals without consideration, and that said Vahrenkamp was permitted to take from the treasury of said corporation large blocks of stock without paying the said corporation any consideration whatever. It is further alleged that in January, 1916, the officers and directors, "while the only property of any value owned by said corporation was being held by the said Vahrenkamp and Garff, voted a levy of an assessment upon and against all outstanding capital stock" of said corporation to develop the property leased as aforesaid and which lease stood in the name of said Vahrenkamp; that the assessment on the stock of said Vahrenkamp and of said officers and directors was paid by false and fraudulent credits; that on the 25th day of August, 1916, said officers and directors wrongfully levied another assessment on all of the capital stock of said corporation, at which time the prior assessment had not been paid into the treasury of said corporation; that said officers and directors "wrongfully and fraudulently permitted payment of said assessment to be made by post-dated checks and notes, and by charging them to the account of said Vahrenkamp," and others, the amounts so charged being stated. It is further alleged that in January, 1917, a further assessment was wrongfully levied by said directors, the facts in that regard being stated in detail. It is also alleged that all of the foregoing wrongful and fraudulent acts and transactions have been called to the attention of said officers and directors of said corporation, but without avail. The plaintiffs then conclude the complaint in the following words:

"That plaintiffs have likewise directed the attention of the stockholders to said fraudulent practices, but have been wholly unable to secure relief because the guilty directors, by reason of their stock holdings, control the affairs of said corporation, and plaintiffs have no plain, speedy, and adequate remedy at law."

The alleged wrongful and fraudulent transactions and practices of said Vahrenkamp and said officers and directors

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are set forth in the complaint with great particularity and detail, of which the foregoing statement is but a very brief synopsis. The statement, though brief, is, however, sufficient to show the nature and character of the wrongs that are complained of, and we shall, in as few words as possible, outline the nature of the relief that plaintiffs desire to obtain.

They pray judgment (1) that said corporation and officers and directors be enjoined from selling the capital stock to pay the assessment levied on January 12, 1917; (2) that said corporation and said officers and directors be required to "show cause why a receiver should not be appointed to take immediate possession of all of the assets of said corporation that stand in the name of the corporation or in the name of the defendant R. B. Garff, or of the defendant Fred H. Vahrenkamp, or any other person, and to hold the same subject to further order of the court"; (3) that the assessments levied August 25, 1916, and January 12, 1917, be declared illegal, fraudulent, and void and that all sales of stock made under said assessments be set aside and annulled, "and that the plaintiff and the interveners shall be decreed the owners and holders of any stock so illegally sold"; (4) "that the said individual defendants and each of them be required to make a full and complete accounting of all the assets and stock of said corporation, and that the court decree all the stock wrongfully issued to be illegal and void, and that the court decree the promissory note for seventeen thousand (\$17,000) dollars issued to the said Fred H. Vahrenkamp, and all other entries, notes, and contracts issued, made, or executed without consideration or without authority of law, to be fraudulent and void, and direct that they be surrendered, canceled, and annulled"; (5) for general relief.

To the amended complaint the corporation interposed a motion and demurrers, both general and special. The grounds in the motion and special demurrers are in many respects identical, and, in substance, are that separate and independent causes of action are commingled; that there are several causes of action improperly united in the complaint; that there is a cause of action stated in favor of the corporation

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and against the officers and directors of the corporation; and another alleged cause of action is stated against the incorporation for an injunction, and still another to annul and set aside certain assessments, and a further cause of action on behalf of the plaintiffs for personal relief. The district court sustained both the motion and the demurrers, and, plaintiffs refusing to plead further, the court entered judgment dismissing the action. Plaintiffs appeal, and assign the rulings of the court as error.

It seems to us that there is no escape from the conclusion that there are several causes of action commingled in the complaint in a single statement. It cannot be doubted that, notwithstanding the alleged control that Vahrenkamp had over the officers and directors of the corporation, 1, 2 and therefore over the corporation, the cause of action to annul and to enjoin the assessments levied on the capital stock is manifestly against the corporation, and that it could be enjoined regardless of the power or influence of any one or of all the officers and directors. It is clear that each assessment is a completed transaction, and if wrong constitutes a complete and independent wrong in itself. For example: The assessment of August, 1916, was a complete transaction, and if wrongful or unlawful constituted complete and independent wrong and thus a separate cause of action. The same is true respecting the assessment of January, 1917. Moreover, the levying of an assessment is a corporate act, and if a cause of action exists at all respecting the levying of the assessment it is in favor of the stockholder. With respect to the levying of an assessment on his stock, the cause of action, if there be one, is against the corporation.

In *Tutwiler v. Tuskaloosa, etc., Co.*, 89 Ala. 391, 7 South. 398, a stockholder, for himself and others, commenced an action to enjoin the sale of his stock by the corporation, and in the same action he, as did plaintiffs in the case at bar, also alleged various wrongs against other stockholders and demanded an accounting from them. The Supreme Court of

Alabama, in passing upon the objection that several causes of action were improperly joined, said:

“A bill claiming such relief [to enjoin the sale of stock] is a bill against the corporation as the only necessary and proper party. The contention is between the stockholder and the corporation, and any relief obtained will necessarily be against the corporation.”

The court then points out that under certain circumstances, where the corporation fails to proceed to protect its rights, a stockholder may do so, but it also points out that that will not justify the joining of causes of action for and against the corporation. In this case the plaintiffs have not only commingled a cause of action against the corporation with one in its favor, but they have also commingled separate and distinct causes of action which are in their favor and against the corporation in one statement. Each assessment, as we have pointed out, is a completed transaction, and, if wrongful, constitutes a separate and distinct cause of action. It is not a case where distinct injuries may arise out of a single wrong and where damages for all of the injuries may be recovered in one action and may be stated as a single cause of action. In case of stock assessments the corporation may have separate and distinct defenses as to each assessment, and where the corporation interposed proper and timely objection, as in this case, it is entitled to have each assessment which is claimed was wrongfully or unlawfully levied stated as a separate cause of action to the end that the corporation may interpose any defense, legal or otherwise, it may have to the several causes of action. Upon the other hand, the alleged wrongful acts and practices of Vahrenkamp and the officers and directors affecting the property and property rights of the corporation constitute a cause of action in favor of the corporation. Any wrongful or unlawful interference with the property of the corporation, or with its property rights, constitutes a wrong against the corporation and not against the stockholder. *Niven v. Peoples*, 23 N. D. 202, 136 N. W. 73; *Tutwiler v. Tuscaloosa, etc., Co.*, supra; *Bachus v. Brooks*, 195 Fed. 452, 115 C. C. A. 354. See, also, 3 Cook, Corps. (7th Ed.) sec. 739.

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In *Nevin v. Peoples*, *supra*, in referring to the matter of an accounting, the court said:

"In an action for an accounting against Peoples and Severton and the return to the bank of any property they may have wrongfully taken from it during their administration the proper party plaintiff is the bank itself."

The doctrine just stated is elementary. It is suggested, however, that in this case the corporation wrongfully failed and neglected to sue, and hence it was not only the right of the plaintiffs, but, perhaps, it was their duty, to proceed. Let that be conceded, and yet it does not in the least affect the principle of pleading and procedure that is involved here. True, if the corporation failed and neglected to protect the corporate interests and property, a stockholder, or any number of them, may proceed to do what the corporation refused in that regard. The cause of action, however, is still one in favor of and not against the corporation. The mere fact that the corporation is made a defendant in the action does not constitute it an adverse party in the sense that the officers and directors are adverse parties. It is made a defendant as a matter of necessity and because it has neglected or refused to complain itself. Whatever judgment may be obtained in the action for an accounting against the officers and directors or others is for the benefit of the corporation. While the stockholder is interested in such an action and in the result, yet he is only indirectly interested, and the cause of action is not his, but belongs to the corporation, and he may sue only in the place of such corporation, for the reasons before stated.

No one would for a moment contend that, if the corporation in this case had commenced an action for an accounting against Vahrenkamp and the officers and directors, it could have enjoined itself from collecting the alleged unlawful assessment. The incongruity and impropriety of attempting such a thing would then have been apparent to all. The fact, however, that the corporation does not bring the action for itself in its own name does not give the plaintiffs, who are acting on behalf of the corporation, the right to join causes of action in one complaint that the corporation could not

have joined, and of course, they, under no circumstances, have the right to commingle several causes of action in one statement. The attempt, therefore, to join a cause of action to enjoin the corporation from collecting certain assessments, which we have seen is a cause of action against the corporation, with one for an accounting against the officers and directors of the corporation, which is a cause of action in its favor, cannot be sustained.

We desire to add that it is not possible to lay down any hard and fast rule regarding what may and what may not be incorporated in one complaint or in a single statement in stockholders' actions, or in any action, for an accounting, where it is alleged that the corporation officers have been derelict and have mismanaged the corporation's affairs and have wrongfully appropriated the corporation's property. In an action for an accounting, wrongful acts, if charged against the same individuals, may, as a rule, be incorporated into one statement in the complaint, regardless of how numerous or how involved the alleged wrongs may be. Under such circumstances the wrong consists in appropriating the property or property rights of the corporation, and that wrong constitutes but one cause of action, regardless of the number of acts on the part of the wrongdoer. The numerous wrongful acts alleged against Vahrenkamp and the officers and directors in this case, therefore, constitute but one cause of action. That, however, is not true respecting the several assessments. As we have seen, each assessment constitutes a complete transaction and an independent wrong by the corporation and an action as against it.

While it is true, therefore, that the plaintiffs, in their complaint, have stated sufficient facts to constitute a cause of action against Vahrenkamp and the officers and directors for an accounting, yet it is also true that the plaintiffs have improperly joined that cause of action with several causes of action against the corporation to prevent the enforcement by it of alleged wrongful assessments against their stock, and have commingled the several causes of action respecting said assessments in a single statement in the complaint. That

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may not be done where proper and timely objection is made.

It is not necessary to dwell upon the other alleged defects of the complaint.

For the reasons stated, the judgment is affirmed, with costs to respondents.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

MOYLE v. SALT LAKE CITY.

No. 2998. Decided September 10, 1917. (167 Pac. 660.)

1. **WATERS AND WATER COURSES—CONTRACTS—CONSTRUCTION.** A city, to obtain a supply of potable water which had already been appropriated, entered into a contract whereby the appropriators agreed to exchange the waters which they had appropriated for an equivalent quantity of water from a canal of which the city was the owner. The contract fixed the quantity of water which plaintiff, one of the appropriators, was entitled to receive from the city's canal, and obligated the city to maintain the canal in repair. The limits of the city were extended, and the land on which plaintiff formerly used the water for irrigation purposes became urban property, and she asserted the right to divert the water at another point on the canal and apply it to other lands. The diversion would in no way injure the city, but merely relieve it of the burden of transporting the water some distance. *Held* that, as the right of an appropriator of water to change the place of diversion is well recognized, plaintiff was, in view of the fact that waste of water is prohibited in arid countries, entitled to demand that the city allow her to take the water from a new location, where she could use it, notwithstanding she had, for many years after the contract was entered into, received the water at a different location. (Page 361.)
2. **WATERS AND WATER COURSES—APPROPRIATORS—CHANGE OF POINT OF DIVERSION.** An appropriator of water, who was entitled to a given amount, may, for the purpose of increasing the benefit from his use, change the point of diversion.¹ (Page 361.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by Alice E. Moyle against Salt Lake City.

¹ *Hague v. Nephi Irrigation Co.*, 16 Utah, 421, 52 Pac. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

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Judgment for plaintiff. Defendant appeals.

AFFIRMED.

H. J. Dininy, W. H. Folland, and M. C. Davis for appellant.

James H. Moyle, H. D. Moyle, and A. T. Sanford for respondent.

FRICK, C. J.

The plaintiff commenced this action to require Salt Lake City to deliver to her certain water, to which, it is conceded, she is entitled under the contract hereinafter referred to, at a point other than where said water has been delivered by Salt Lake City since the year 1888, when the contract was entered into. The facts are not disputed. Those that are material, in substance, are:

That in June, 1888, Salt Lake City and certain farmers, who were the owners of primary water rights in what is known and called Parley's Canyon creek, a stream having its source in the Wasatch Mountains lying east of Salt Lake City and flowing westerly through Salt Lake valley into the Jordan river, entered into an agreement in which the owners of said water agreed to exchange the water obtained by them from said Parley's Canyon creek for water owned by Salt Lake City which it obtained from Utah Lake through the Jordan river, and through what is designated the Jordan & Salt Lake City Canal, which is owned by Salt Lake City. The exchange of the waters was made for the benefit of the inhabitants of Salt Lake City, in that the water from Parley's Canyon creek is potable mountain water, while the water obtained by the city from Utah Lake is nonpotable, but is suitable to irrigate the lands and crops of the farmers with whom the exchange was made.

The court found, and the findings are not questioned, that the plaintiff in this action is the owner of "144.5/2027" of the waters exchanged as aforesaid, which is the equivalent of "144.79 acre shares of the water of Parley's Canyon creek." The water used by the plaintiff was, for many years, used by

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her within what is called the basin of Parley's Canyon creek and on lands lying immediately southeast of Salt Lake City, which lands, in the last few years, have, however, become a part of Salt Lake City, and have thus ceased to be used for farming purposes, but are being used for residential purposes by some of the inhabitants of Salt Lake City. In view of the changed conditions, the plaintiff no longer uses, or can use, said water on lands lying within the basin of Parley's Canyon creek. She, however, owns lands lying about five miles south of the lands on which she formerly used the water, and about five miles south of where the water has always been delivered to her, on which she can use all the water she is entitled to under said exchange agreement with Salt Lake City. Upon that subject the court found (which finding, to avoid repetition, we make a part of this statement) as follows:

"That plaintiff has no lands upon which said water can be beneficially used in or near the vicinity in which said water has been heretofore used, but the said water, of which said plaintiff is the owner, can be beneficially used upon her above-described lands, which are situate about five miles south of said point of diversion, and which lie adjacent to and immediately below said canal, as aforesaid. That the said quantity of water, of which plaintiff is the owner and thus entitled to use, can be diverted upon plaintiff's said lands out of said Salt Lake & Jordan Canal, through the weir aforesaid, without any damage whatsoever to said defendant city or to any person whomsoever, and does not impair any vested right of any person whomsoever, and said city will be saved the cost of conveying said water a distance of about five miles."

For the same reason we also insert here the material portions of the agreement entered into between the parties aforesaid:

"It is hereby agreed as follows: The parties of the first part, whose names are signed hereto, agree to exchange the waters of the Parley's Canyon creek to which they are entitled for an equivalent quantity of water from the Jordan & Salt Lake City Canal, * * * and to permit, allow, and authorize said party of the second part to take said waters of

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the Parley's Canyon creek at any point it may choose, and devote the same to the use and benefit of the inhabitants of Salt Lake City. * * * The second party agrees to maintain all existing rights of the parties of the first part to the waters of the said Parley's Canyon creek, and to keep in repair the said Jordan & Salt Lake City Canal, and by its agent, jointly with the agent of the parties of the first part, and at the expense of the former, turn out from the said canal the proper portion of the water due to the parties of the first part on the exchange as aforesaid, and also to construct the necessary ditch or ditches, headgates, and dams to take out the said waters of the said canal and Parley's Canyon creek, and provide for rights of way for the same, all at its own cost and expense, and without cost or expense to the parties of the first part. * * * This agreement shall be perpetual, if the covenants and conditions herein expressed are kept and complied with."

While nothing is contained in the agreement respecting the precise place where Salt Lake City was to deliver the plaintiff her share of the water, yet, as before stated, the water was delivered to her, ever since 1888, within the basin of Parley's Canyon creek, and at a point about five miles north of where she now seeks to have the same delivered.

The only defense interposed by Salt Lake City is that the plaintiff is not entitled to have the water delivered at any other point or place than the one where she first elected to receive it from the city, and that permitting her to take the water at some other place or point is violative of the provisions of the contract, and amounts to an impairment, or, at least, a change, of the obligation assumed by the city in entering into the contract.

Upon substantially the foregoing facts the court found all the issues in favor of the plaintiff, and entered conclusions of law and a judgment or decree requiring the city to deliver plaintiff the amount of water she is entitled to under the contract from the said canal at the point selected and through the weir prepared by her, but without additional cost or expense to the city.

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The city appeals, and the only propositions argued are the two we have stated above. True, counsel assign various reasons in their argument why plaintiff should fail, but the real reasons are those we have stated.

We fail to see how the judgment or decree in any way contravenes any of the stipulations contained in the city's contract. There is nothing in the contract specifying any particular place where plaintiff's share of the water shall be delivered to her. True, by receiving the water 1, 2 at a particular place for many years past the plaintiff could not now successfully urge that the city had not fulfilled its part of the agreement. Apart from the fact, however, that the water has been delivered as before stated, there is absolutely nothing in the contract that binds the plaintiff to receive the water at any particular place or point. Nor is there anything in the contract that prevents her from having the water delivered to her at any other point, provided always that in doing that she in no way inconveniences the city, or increases its cost or expense of delivering the amount of water to her to which she is entitled under the agreement. It no doubt is true, as contended by the city's counsel, that ordinarily, in case a place of delivery is fixed in the contract, the party agreeing to deliver cannot be required to deliver at any other place or point without disregarding the terms of the contract. As we have pointed out, however, there is no specific place of delivery fixed in the contract in question, and the only contention made by counsel in that regard is that the water had actually always been delivered to and received by the plaintiff at a certain place during the past. That, however, merely goes to show that she was willing to receive it, and that the city was also willing to deliver it, at that particular place. In case, however, no specific place of delivery is mentioned in the contract, but the party to whom a particular thing is to be delivered, nevertheless, receives it at a particular place, why may not such party ask to have the thing delivered at some other place, if to make the delivery at such other place is as convenient and no more expensive to the party required to make the delivery? In doing that,

how are the obligations of the contract either disregarded or impaired? If it were conceded, however, that the place of delivery could not be changed in case of a contract in which one party agreed to deliver specific articles of goods or merchandise to another for a term of years, it does not at all follow that it may not be done under a contract like the one in question here.

In arriving at a just conclusion in this case, it is important to keep in mind the subject-matter of the contract and the object or purpose of the parties. In connection with those, the law, as it affects the subject-matter of the contract, must also be kept in mind. The law upon the subject-matter of the contract in question is as much a part of it as though it were incorporated into the writing itself. What is the law regarding the use of water in this arid region? The law will not permit any owner to waste water, nor will it permit him to claim more than will supply his needs. If conditions change, the law, nevertheless, applies to the changed conditions. In this case the district court found that the plaintiff no longer can use the water where it was first received by her under the contract, but in that connection also finds that she can make a beneficial use of it at some other place under the city's canal, at which place it is just as convenient and no more expensive for the city to deliver the water to the plaintiff than at the point where it was first received, but where it can no longer be used, and, if delivered there, it will result in wasting the water. What, then, is the law applicable to such a condition? As a question of law does it not merely amount to this, that the plaintiff is seeking to change the point of diversion? Assuming the city's canal to be a natural stream, and that the plaintiff had appropriated and was entitled to divert the quantity of water found by the court from such stream, no one would doubt her right to change the place of diversion to some other point on the stream, so long as she, in making the change, did not interfere with the rights of any one else. The city concedes that the plaintiff is entitled to a certain quantity of water flowing in its canal, and that she has received it and it has been delivered to her at a par-

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ticular place. Now, why may she not change the point or place of delivery precisely upon the same conditions and upon the same theory that she may change the point or place of diversion on the stream, provided she does so without increasing or adding to the expense of the city in delivering the water to her? Is not the right to change the place of diversion under the law based upon the fact that conditions change, and that it may be that the original point of diversion selected by the appropriator no longer responds to his needs, and that to continue the old place of diversion may result in waste?

True, there are no contractual obligations involved where a change of diversion on a stream is made; but is it not pertinent to ask in what way are contractual obligations involved in this case? As we have seen, the law is a part of the contract, and it is conclusively presumed that the parties to the contract entered into every stipulation in view of the existing law. Indeed, they were bound to do so, and, if they had entered into stipulations that were contrary to law, those stipulations would be void. We must assume, therefore, that the parties to the contract in question had in mind the fact that the conditions not only might, but that they in all probability would, change, and that it might be that the plaintiff or some other of the parties to the contract might require the place of delivery changed, which, as we have seen, amounts to a change of the place of diversion, and that, when it became necessary to do that, the change could be made upon the same conditions that any other change of the place of diversion could be made, namely, at the expense of the party making the change and without interfering with the rights of others. The law respecting the right of another appropriator to change the place of diversion is well settled in this jurisdiction, and, so far as we are aware, in all other jurisdictions where the right to appropriate water is recognized. *Hague v. Nephi Irr. Co.*, 16 Utah, 421, 52 Pac. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 73; 2 Kinney, Irr., etc. (2d Ed.), sections 857, 858; 1 Weil, Water Rights (3d Ed.), section 504.

We are of the opinion, therefore, that the district court has in no way invaded any contractual rights of the city, nor has it in any way disregarded any of its legal rights in entering the judgment appealed from. We desire to add, in conclusion, however, that we do not want to be understood as holding that, although a person or corporation has agreed to deliver a certain quantity of water to another at a particular place, the place of delivery may not be changed in case the owner of the water can no longer use it at the original place of delivery, the same as the original place of diversion may be changed by the appropriator under the law. It is not necessary to decide that question now, and therefore we express no opinion upon it.

For the reasons stated, the judgment is affirmed, with costs to respondent.

MCCARTY, CORFMAN, and GIDEON, JJ., concur.
THURMAN, J., being disqualified, did not sit in this case.

FELT CITY TOWNSITE CO. v. FELT INVESTMENT
CO. et al.

No. 2903. Decided September 20, 1917. (167 Pac. 835.)

1. **PLEADING—MOTIONS—SEPARATING CAUSES OF ACTION.** Under Comp. Laws 1907, section 2961, authorizing the joinder of certain causes of action, but providing that they must be separately stated, and section 2962, specifying the grounds of demurrer, and not specifying as a ground of demurrer the failure to separately state separate causes of action, an objection that causes of action are not separately stated may be made by motion to require plaintiff to separately state them. (Page 371.)
2. **JUDGMENT—DEFAULT—PENDENCY OF MOTION.** Under Comp. Laws 1907, section 3179, subd. 1, authorizing judgment for plaintiff in an action on contract for the recovery of money or damages if no answer, demurrer, or motion has been filed within the time specified in the summons, a motion to require plaintiff to separately state causes of action being one recognized by law is sufficient to prevent the entry of default until it is disposed of. (Page 372.)
3. **ACTION—"CAUSE OF ACTION"—ELEMENTS.** Every judicial action involves a primary right, a corresponding primary duty, a delict or wrong consisting in a breach of such primary right and duty, a

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remedial right and a remedial duty, and the remedy or relief itself, and of these elements the primary right and duty and the delict or wrong combined constitute the "cause of action"; the remedy being no part of the cause of action. (Page 373.)

4. ACTION—SPLITTING CAUSES OF ACTION—BREACHES OF CONTRACT. Though there are many breaches of a single contract, they may not be split up into several causes of action. (Page 374.)
5. PLEADING—SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT. A complaint alleged that the defendant corporation sold plaintiff an exclusive option on lots in a townsite in Idaho, and agreed to survey, plat, and record the unplatted portion of the land; that the vendor covenanted that a certain portion of the proceeds of sale should be deposited as a trust fund for the construction of a bridge near the townsite, and agreed when lots were sold and fully paid for to deliver a deed and abstract of title, and a land value guarantee contract; that the individual defendants received payments of money under the contract, including trust fund payments, and had appropriated to their own use all of the trust funds except a specified amount; that defendants had failed to plat certain portions of the land, and had furnished an inaccurate map of other portions; that the laws of Idaho required the platting of lots in a townsite before any sale thereof, and imposed a penalty for each lot sold; that defendants had disposed of lots to plaintiff knowing that they had not been platted, and by certain misconduct had hindered plaintiff in the sale of 930 lots not platted, and deprived plaintiff of the profits thereon; that under the Idaho law defendants had forfeited to plaintiff \$50 for each of such lots; that they retained and held such trust funds in a specified sum; and that they had damaged plaintiff by failing to furnish an abstract of title and bond for lots fully paid for. *Held*, that the failure to survey, plat, and record lots, and the failure to furnish abstracts, deeds, and bonds, were merely different breaches of a single contract constituting but one cause of action, and not required to be separately stated under Comp. Laws 1907, section 2961. (Page 376.)
6. ACTION—PLEADING—JOINDER OF CAUSES—SEPARATE STATEMENT. While if the complaint had alleged that the defendant corporation failed to deposit the trust fund and appropriated it to its own use, this might have been merely another breach of the contract and part of the one cause of action, the wrong complained of having been committed by the individual defendants with whom plaintiff had no contractual relation, this constituted a separate cause of action which not only should have been separately stated under Comp. Laws 1907, section 2961, but was obnoxious to the further provision of that section, that causes of action united must affect all the parties to the action. (Page 376.)

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7. **PLEADING—SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT.** If the penalty for violation of the Idaho statute was recoverable by plaintiff rather than by the state of Idaho, it constituted a separate cause of action to be separately stated. (Page 377.)
8. **PLEADING—MOTIONS—SEPARATE CAUSES OF ACTION.** A motion to require plaintiff to separately state several distinct causes of action contained in the complaint should have been definite, certain, and specific as to the causes of action which defendant claimed were contained in the complaint, and a motion not specifying the different causes of action was too indefinite. (Page 378.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by the Felt City Townsite Company against the Felt Investment Company and others.

Judgment dismissing the action. Plaintiff appeals.

AFFIRMED.

B. N. C. Stott for appellant.

Cheney, Jensen & Holman for respondents.

THURMAN, J.

This case was heard at a former term of this court during 1916, and three separate opinions were handed down. Application for rehearing was filed, and before the application was disposed of there was a partial change in the personnel of the court rendering it almost imperative that the application for rehearing be granted, and it was granted. Since then the membership of the court has been increased by the appointment of two additional judges, and the case was reargued during the present term of the court as now constituted. The opinions rendered at the former term have not been published. This opinion must therefore be considered as the official opinion of the court, and is the only one that will be published.

The questions involved relate to practice only, and in stating the case only so much of the proceedings will be detailed as is necessary to determine the particular points in controversy.

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The plaintiff is the successor in interest to the rights and obligations of certain contracts for the purchase of town lots platted, and to be platted, in Felt City townsite, Fremont County, Idaho. The defendant corporation is the vendor, and the plaintiff and its predecessors will be referred to as the vendee. The vendor sold to the vendee an exclusive option to purchase said lots at certain prices according to their classification and on certain terms specified in the contract. The vendor agreed in said contract that it would at its own expense survey, plat, and record the unplatted portion of said land. Payment was to be made and accounts of sales rendered by the vendee from time to time as the lots were sold, and the vendor covenanted that a certain per cent. of the money arising from sales should be deposited by it in a certain bank in Salt Lake City as a trust fund to be used for the purpose of constructing a bridge across the river at or near the Felt City townsite. Vendor also agreed that when lots were sold and fully paid for the vendor, within thirty days, on demand, would make and deliver to vendee a warranty deed and abstract of title and procure a land value guarantee contract executed by the Federal Guarantee Company for said lot or lots. The option was to continue for five years, unless sooner forfeited.

The above and foregoing is the substance of the material parts of the contract as far as the vendor's covenants are concerned. The covenants and agreements of the vendee are immaterial inasmuch as it is alleged in the complaint, in effect, that plaintiff fully performed the promises and agreements on its part to be performed.

The complaint pleads the contract literally in words and figures, and then alleges in effect, that the defendants, other than the corporation, received payments of money under said contract, including trust fund payments, amounting to \$2,968.89, and that said defendants have appropriated to their own use all of said trust funds except the sum of \$468.58. It is then alleged that defendants failed to plat into lots, blocks, and streets certain portions of said land; and, further, that a map furnished by defendants for other portions

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of the land was false and inaccurate. The complaint then sets out in full certain sections of the Idaho Rev. Codes (sections 2300-2314) requiring owners and proprietors of land desiring to lay out a townsite to survey, plat, stake, and record the same; and the law also provides (section 2314) that any person disposing of or offering for sale or lease any such lot until the plat has been acknowledged and recorded shall forfeit and pay \$50 for each of said lots. The complaint further alleges that defendants disposed of and offered for sale all of the lots in said townsite to plaintiff knowing that the same had not been platted, and by certain alleged misconduct on the part of defendants plaintiff was hindered in the sale of 930 of said lots not surveyed, platted, and recorded, and was thereby deprived of the profits thereof in the sum of \$23,250; that under the terms of the Idaho statute defendants had forfeited to plaintiff \$50 for each of said 930 lots in the aggregate sum of \$46,500; that defendants retain and hold said trust fund in the sum of \$2,503.21, and for failing to furnish abstract of title and bond for lots fully paid for plaintiff has been damaged in the sum of \$5,000, for all of which sums and amounts plaintiff prays judgment against all of the defendants.

The complaint was served and filed on the 30th day of October, 1916, and on the 17th day of November, following, defendants appeared and filed a paper denominated "Motion for an order requiring separate statement of causes of action." The instrument, in effect, moved the court to require plaintiff to separately state the several distinct causes of action in its complaint, referring to the statute relied on by the defendants. Three days afterwards, on the 20th of November, plaintiff filed a demand with the clerk of the court that default be entered against defendants. The clerk complied with the demand and entered default. On December 8th, following, defendants obtained an order of court setting December 11th as the date for hearing a motion to strike the demand for, and certificate of, default from the files, and at the same time filed their motion. The motion was not heard until the 17th of December at which time the court ordered that the default be stricken.

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Plaintiff then demanded of the court that default be entered. On the 23d of December the court denied plaintiff's motion for default, and on December 30th granted defendants' motion requiring plaintiff to separately state the several causes of action contained in the complaint, designating them, in effect, as follows: (1) For the recovery of the trust fund; (2) for the recovery of profits that plaintiffs would have earned but for the fraudulent representations of defendants; (3) recovery of damages for the breach of the contract; and (4) the amount forfeited to plaintiff under the Idaho statute. The court allowed plaintiff time within which to amend its complaint. On the 8th day of January, following, plaintiff served and filed notice to the effect that it would stand upon its complaint and declined to amend. The court thereupon entered judgment dismissing the action. Plaintiff appeals and assigns as error these several rulings and orders of the court.

The foregoing statement is a brief history of the material portions of all the proceedings down to the time the appeal was taken. Its prolixity is partly accounted for by the nature of the case and partly by a belief that a full statement at this time will tend to shorten the opinion.

The former opinions rendered in the case, to which reference has been made, although conflicting one with another on some of the questions involved, are very illuminating and instructive, and will tend to lighten the burden of the writer in his attempt to express the views of the court. Comp. Laws 1907, section 2961, reads as follows:

"The plaintiff may unite in the same complaint several causes of action, legal or equitable, or both, where they all arise out of: (1) The same transaction, or transactions connected with the same subject of action; or, (2) contracts express or implied; or, (3) injuries, with or without force, to person and property, or either; or, (4) injuries to character; or, (5) claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same, or waste committed thereon; or, (6) claims to recover personal property with or without damages for the withholding thereof; or, (7) claims against a trustee by virtue

of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

It will be seen that this section provides for the union of several causes of action in the same complaint where they all arise out of one of the classes named in the section. It, however, also provides that the causes so united must be separately stated. It is manifest from a casual reading of the section just what it means. The causes of action named in one class cannot be united with a cause or causes of action named in another class at all, and causes of action even in the same class cannot be united unless they are distinguished one from the other by a separate statement. In this case defendants, assuming that several causes of action were commingled in the complaint and not separately stated, as provided by the section we have quoted, before their time to appear expired, filed and served the paper above referred to, denominated a motion. On the other hand, plaintiff, assuming it was no motion at all, appeared at the earliest possible date after defendants' time expired and procured default to be entered. Whether the paper filed and served by defendants was in fact a motion becomes vitally material in the case in view of Comp. Laws 1907, section 3179, subd. 1, which, in part, reads as follows:

"Judgment may be had, if the defendant fail to answer to the complaint, as follows: (1) In an action arising upon contract for the recovery of money or damages only, if no answer, demurrer, or *motion* has been filed with the clerk of the court within the time specified in the summons. • • •"
(Italics ours.)

It is upon the hypothesis that the paper filed by defendants was a motion that defendants insist the entry of default was illegal and irregular; and on the other hand, it is upon the hypothesis that the paper filed was not a motion that plaintiff insists the default taken was legal and regular. This is the principal question in the case, for upon its solution depends

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whether or not the court erred in its order directing that the default be stricken from the files.

Upon examination of Comp. Laws 1907, section 2962, it will be noticed that, while a demurrer to a complaint may be interposed on the ground that several causes of action have been improperly united, there is no provision for demurrer to a complaint on the grounds that the complaint contains several causes of action not separately stated. It will be observed, however, that section 2961, Comp. Laws, above quoted, declares that causes of action in a complaint must be separately stated. Thus we find the condition to be that while the statute declares that causes of action must be separately stated, it nowhere provides a specific remedy or form of procedure by which the statute can be enforced. In *Kurtz v. Sanitarium Co. et al.*, 37 Utah, 313, 108 Pac. 14, this court held that where the objection to the complaint is that the complaint contains several causes of action not separately stated, the proper procedure is by motion to require the plaintiff to separately state the causes of action. This view of the question appears to be supported by the great weight of authority.

"In providing for a demurrer on account of an improper union of causes of action, the question first arises whether a demurrer will lie, and lie only, where the union itself is wrong without reference to the manner of the union, or whether it lies to the improper commingling in one statement of different causes of action, although they might have been united had they been separately stated. It is now universally held that the demurrer will only lie when the union itself is forbidden; it does not matter whether causes so improperly united are separately stated or not; the omission to state them in separate counts does not deprive the defendant of the right to demur. But when causes of action which might have been united in one pleading, had they been separately stated, have been improperly intermingled in one count, the remedy is by motion." Bliss, Code Pleading (2d Ed.) p. 412, section 412.

"In nearly all jurisdictions a demurrer for misjoinder of causes of action will lie to a declaration, complaint, or petition, when it appears on the face thereof that two or more causes of action have been improperly united. And it makes no difference whether the causes of action improperly united are stated in separate counts or paragraphs, or are mingled in one count or paragraph. If, however, causes of action which may be properly united are improperly mingled in one count or paragraph, the remedy for such defect is not by demurrer but by a

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motion to make more definite and certain." Ency. Pl. & Pr. vol. 6, pp. 340, 341.

"A complaint which sets forth a single cause of action, but asking several distinct forms of relief, all properly obtainable under the facts stated, is not demurrable on the ground of misjoinder of actions. Nor is a complaint demurrable on this ground, for the defect of not separately stating two or more causes of action, they being such as might, if properly stated, be united in one complaint; the proper remedy in such case is by motion." Boone, Code Pleading, p. 84.

Nearly all the authorities on Code pleading are to the same effect.

In California the objection may be raised by demurrer. *White v. Cox*, 46 Cal. 169, and earlier cases. In the experience of the writer the California practice was, to a great extent, followed in the district courts of this state until the ruling in the Kurtz Case, *supra*. As suggested in one 2 of the former opinions in this case, to which reference has been made, there seems to be no logical reason why the objection could not be raised by demurrer except that the statute does not specify it as grounds for demurrer. Neither does it specify it as grounds for a motion; but this court having established a remedy for a wrong not specifically provided for by statute—a remedy in accordance with the overwhelming weight of authority elsewhere—there should no longer be any question as to its correctness. Therefore the paper filed by defendants in this case, denominated a motion, being in fact a motion recognized by law, was sufficient, in view of the statute relating to default, to stay entry of default until the motion was disposed of. Whether or not the motion was sufficiently specific and definite in its terms does not alter the case. If an answer had been filed which did not state a defense, or a demurrer insufficient in form to raise the objection intended by the pleader, it would, nevertheless, have been sufficient to prevent default being entered by the clerk until the matter was judicially determined. We have no hesitancy in holding that the default in this case was illegal and irregular; and the court did not err in striking it from the files. Neither did the court err in denying the demand of plaintiff that default be entered, when the application was afterwards

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made in open court, especially as defendant's motion to segregate the causes of action was still pending and undisposed of.

It is, however, contended that the court erred in holding that the complaint contained several causes of action, and in requiring plaintiff to separately state them. The question to be determined under this assignment, as we understand it, is not how many causes of action can be carved out of the complaint, but are there more than one. The motion filed by defendants did not designate, or in any manner distinguish, the several causes, if there were more than one. It was as indefinite in that respect as it was possible for a motion to be. We will refer to this feature of the case again before concluding this opinion because it involves a question of practice too important to be ignored.

The authorities and cases cited in the opinions heretofore handed down in this case, prior to the application for a rehearing, are exceedingly instructive as to what constitutes a cause of action and the commingling of several causes of action without separately stating them. As 3 to the law on that subject there is no disagreement in the opinions referred to. The only difference arose in the application of the law to the present case. In undertaking to define a cause of action, Mr. Pomeroy, in his excellent work, "Remedies and Remedial Rights" (2d Ed.), sections 452, 453, after explaining the difficulty of obtaining a concise definition from judicial decisions, says:

"Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential elements. Of these elements, the primary right and duty and delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the Codes of the several states."

The primary right of the plaintiff in the present case was to have every promise and agreement made by the defendants strictly complied with according to the contract. The primary

duty of the defendant corporation was to strictly perform its promises and agreements so made. The wrong or delict committed by defendant consisted in the breach or failure to perform. These constitute plaintiff's cause of action according to the above quotation, and the definition is about as clear and succinct as human language can express. The remedy is no part of the cause of action. It is the procedure by which relief is obtained. If this distinction is kept in mind confusion and misapprehension as to whether or not a complaint contains one or more causes of action will oftentimes be avoided. In 1 C. J. 1059, it is said:

"Causes of action, properly speaking, are clearly distinguishable from the remedial rights to which they give rise; and since the relief demanded is no part of the cause of action, and the same cause of action may give rise to several remedial rights, the question as to whether one or more causes of action are stated is not to be determined from whether different kinds of relief are prayed for or different objects sought."

It does not follow because there are many breaches of a single contract that, therefore, it may be split up 4 into several causes of action. In Bliss on Code Pleading, section 118, it is said:

"It is a rule that a cause of action—as, one springing from a single contract—cannot be so split as to authorize more than one action; and the same rule would make it improper to so divide a single cause of action, by separate statements in one complaint, as to show more than one cause of action."

See, also, *Secor v. Sturgis*, 16 N. Y. 548.

In Bates, Pl. & Pr. p. 485, the author says:

"In general, each contract and each tort constitutes but one cause of action; the several breaches of the one and the several items of loss flowing from the other are but parts of the same cause of action"—citing Pom. Rem., etc., section 460; Bliss, Code Pl., section 118.

In *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775, the court says:

"If plaintiff pleads several contracts, and a breach of each, he states several causes of action; but if he pleads but a single contract and a breach of it in one or more particulars, he states but a single cause of action, and it is immaterial how the complaint is paraphrased"—citing *Nelson v. Henriksen*, supra.

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In 1 Ency. Pl. & Pr. 153, the rule is stated thus:

"But where there are breaches of several and distinct covenants contained in the same instrument, all these breaches must be sued for together; while independent stipulations may be sued for as the breaches occur, all the breaches existing at the time the action is brought are only one cause of action."

In 1 C. J. pp. 1111, 1112, it is said:

"It is well settled that an entire contract or entire claim or demand arising out of contract cannot be split up and made the subject of different actions. A single breach of an entire contract gives but one cause of action, and all the damages claimed by reason thereof must be recovered in a single action. Conversely, where demands arising out of contract are distinct and separate they give rise to separate causes of action for which separate actions may be maintained, notwithstanding they are of such a character that they might be joined in one action, and consequently a severable contract may be severed and different actions brought thereon. The difficulty is in distinguishing between entire and severable demands, and applying the general rule to particular cases. Clearly, where there are entirely distinct and separate contracts, each gives rise to a separate cause of action, but it is also true that the same contract may give rise to different causes of action, either by reason of successive breaches of the contract, or by reason of the different stipulations or provisions of the contract."

In Pomeroy's Code Remedies (4th Ed.), section 351, the doctrine is stated in practically the same language. In 1 Bates Pl. & Pr., etc., 151, 152, it is said:

"In respect to contracts express or implied each contract affords one and only one cause of action. But just what makes a single contract giving only one cause of action which cannot be split is often a difficult question, and the cases are not altogether harmonious."

The foregoing excerpts from leading authorities and cases relating to what constitutes a cause of action, especially in contractual relations, are about as definite as can be found in the law; and still it is perfectly manifest, upon reading them, that in their application to a complicated case even learned and able lawyers and judges may radically differ. The present case is an instance in point. The district court, in deciding the motion to separate the causes, found four distinct causes of action and stated them in his ruling upon the motion. In this court, in the former opinions before rehearing, two of the justices found only one cause of action, and one of them found two, and probably three. We are not certain but that

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the defendants thought there were five. Of course appellant insists there is only one. It is our duty at the present time to determine whether there is one cause of action only, or more than one.

We have endeavored to give to the contract relied on a careful and painstaking analysis. The defendant corporation covenanted and agreed to survey and plat the ground and subdivide it into lots, blocks, streets, alleys, etc., at its own expense. It also agreed to deposit a certain per- 5, 6 centage of the money arising from sales of lots in a certain Salt Lake bank as a trust fund for some beneficial purpose connected with the townsite. It also agreed to furnish abstracts of title, warranty deeds, and a guaranty bond whenever lots were fully paid for and on demand of the vendee. There is no question in the mind of the court but that the failure to survey, plat, and record, and the failure to furnish abstracts, deeds, and bonds, are merely breaches of a single contract, and constitute but one cause of action under the authorities cited. And if it had been alleged that the defendant corporation failed to deposit the trust fund and appropriated it to its own use, we would be inclined to the view that that also was merely another breach of the contract, and that all the breaches would constitute but one cause of action. But the allegations of the complaint will not admit of such construction. The agreement to deposit was made by the corporation, and not by the other defendants. The wrong complained of in relation to the trust fund was committed by the other defendants, and not by the defendant corporation. The corporation defendant with whom the contract was made is not charged with any wrong in respect to the trust fund, but the individual defendants who had no contractual relation with the plaintiff are charged with converting the fund to their own use. It is, to say the least, an unusual character of pleading; so much so that one is almost constrained to believe there must have been some inadvertence or oversight on the part of the pleader. Be that as it may, it does not alter the case, whatever may have been the cause for the condition we have described. The complaint

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must be dealt with as we find it, and it is too clear for controversy that the charge against the individual defendants for misappropriating a trust fund, when there were no contractual relations on their part, cannot be commingled with a cause of action against all the defendants for a breach or breaches of a contract made with only one. It is difficult to see how it can be united at all in the same action, even if it were separately stated. It is not only obnoxious to the provisions of the statute quoted against the commingling of several causes of action in one and the improper union of causes, but it is likewise obnoxious to the provision of the same statute which provides that "the causes of action so united * * * *must affect all the parties to the action.*" (Italics ours.) Comp. Laws 1907, section 2961.

Inasmuch as plaintiff, in the prayer of its complaint, prays for actual damages in the sum of \$28,250, this being the aggregate sum of the damages claimed for breaches of the contract, and \$2,503.21, trust fund appropriated by the defendants to their own use, there can be no question but that the misappropriation of the trust fund is itself a cause of action. The court is also of the opinion that it is an independent cause of action, and, if proper to be united at all with the other cause mentioned, it should have been separately stated as the statute provides. The district court, therefore, did not err in requiring the plaintiff to separately state the several causes of action in its complaint.

There is another demand by plaintiff for a large sum of money on account of the penalty provided in the Idaho statute for disposing of, or offering to dispose of, or lease, unplatted lands. It is contended by defendants that this claim also constitutes a cause of action not separately stated in the complaint. It is doubtful whether or not the court in this opinion should enter into a consideration of that matter in view of the very meager discussion of certain questions that ought to be considered in arriving at a correct conclusion. There is perhaps a serious question as to whether the plaintiff or the state of Idaho is entitled to the penalty. The statute itself is silent on that question. If,

as a matter of law, it belongs to the state, then the question arises: Is not the statement of the claim and everything connected with it in the complaint entirely irrelevant, mere surplusage, and subject to be stricken on motion, or, if not stricken, entirely ignored? If that view is taken it need not be considered a separate cause of action. On the other hand, if, as matter of law, the claim of plaintiff for the sum forfeited is valid, no answer can be made to the logic of one of the former opinions filed in this case. The cases cited are as follows: *Barkley v. Williams*, 30 Misc. Rep. 687, 64 N. Y. Supp. 318; *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981; *Wiles v. Suydam*, 64 N. Y. 173; *Loup v. Cal. S. R. R. Co.*, 63 Cal. 97; *People v. Wells*, 52 App. Div. 583, 65 N. Y. Supp. 319; *Gurley v. McAnally*, 109 Ala. 359, 19 South. 518. These cases hold, in effect, that a statutory penalty such as we have in this case constitutes a separate cause of action, and the New York and Alabama cases go so far as to hold that they cannot even be united in the same action. The question, however, as to whether plaintiff or the state is entitled to the penalty and the bearing that question may have upon the proper solution of the question before the court, as before stated, is in doubt; and because the matter has not been fully presented in argument by counsel, we are not inclined to decide it at this time. Besides, it is not necessary that that question should be determined on this appeal. When the trial court decided that the complaint contained several causes of action not separately stated plaintiff was given time to amend its complaint in conformity with the ruling of the court. The plaintiff elected to stand upon its complaint and declined to amend, whereupon judgment was entered dismissing the action. Under the circumstances there was no error in the ruling of the court.

Because of the importance of the questions of practice involved, to litigants, members of the bar, and the courts of the state, before concluding this opinion we feel it our duty to call attention to one feature of the case to 8 which allusion has already been made. We are of the opinion that the motion filed by the defendants requiring the several causes of action in the complaint to be separately stated

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was too indefinite, and should have been more certain and specific. It reads as follows:

"Comes now the defendant Felt Investment Company and without waiving any of its rights to demur, or otherwise plead to the complaint herein, moves the court for an order requiring this plaintiff to separately state the several distinct causes of action in its complaint contained, in accordance with the provisions of section 2961 of the Compiled Laws of Utah of 1907."

If the plaintiff, instead of insisting that the paper filed by defendants was not a motion at all, had resisted the motion on the grounds that it was indefinite and insufficient as a notice of what was required by the plaintiff, a different order would probably have been made by the trial court. If, however, under such circumstances, the trial court had, against plaintiff's objections, granted the motion and dismissed the action, as was done in this case, a different case would have been presented for our consideration. We have already shown how widely men, trained in the law, differed as to the number of causes that could be carved out of this complaint. They vary all the way from one to four, and probably five. If plaintiff had endeavored to comply with the requirements of defendants' motion as filed, without going into court, it is improbable it could have amended the complaint on the first attempt so as to satisfy plaintiff's conception of a proper pleading. This would have provoked another motion of the same kind and perhaps another ineffectual attempt to amend, and so on, until finally by sheer exhaustion perhaps, or by some process of elimination, a conclusion would have been reached satisfactory to the plaintiff. Defendants should have made their motion definite as to the number of causes and specifically pointed them out. Volume 6, Ency. of Law, p. 117, says:

"A motion must state the grounds or reasons on which it is based, or it will be overruled."

On page 118, same volume, the rule is stated:

"The objection or objections on which the motion is founded should be stated specifically, so that the court may readily see that the motion should be granted."

28 Cyc. p. 6, says:

"The particular grounds of a motion should appear plainly either by the notice of motion or the affidavits accompanying the same.

In *Ambrose v. Parrott*, 28 Kan. 494, the court animadverts upon just this kind of motion made for the same purpose as the motion in the present case, and while the court did not, under the circumstances of that case, reverse the trial court, which had overruled the motion, yet the reasoning of the court strongly condemns the character of the motion filed in that case. We here quote from a note appearing in volume 6, Ency. Pl. & Pr. pp. 118, 119:

"In *Ambrose v. Parrott*, 28 Kan. 698, it was claimed that the complaint contained more than one cause of action, and a motion was made to require the plaintiff to state separately such alleged causes of action. It was objected that the motion was too indefinite in that it failed to point out wherein the petition in the court below stated more than one cause of action, and how many causes it was claimed that it did state. The motion was overruled, and on appeal the court said: 'Now, we would think that, in all fairness to the trial court and to the opposite party, the motion should have been more definite and specific than the motion in this case was. We would think that a motion filed for such a purpose should in all cases point out specifically the matters which the party filing it desired the court to act upon. It should designate the matters supposed to constitute each separate and distinct cause of action so that the court might act intelligently. We think, however, the court might in its discretion act upon and sustain just such a motion as the one which was filed in the present case. If the court, however, should overrule the motion, as was done in the present case, then the question arises: Should the Supreme Court reverse the decision of the trial court simply because it overruled such an indefinite motion? Generally, we would think not. Perhaps cases might occur where we would think otherwise. But such cases would be rare. It may be claimed that the object of the present motion was obvious, that the court should have known from an inspection of the petition just how many causes the defendants claimed were stated therein, and what they were, and therefore that there was no necessity for the defendants designating in their motion how many causes of action they supposed were stated in the plaintiff's petition or what they were. But this is not entirely clear.' "

We do not see how there can be any dissent from the proposition that the motion in a case of this kind should be definite, certain, and specific as to the causes of action the defendant claims are contained in the complaint. It certainly is just as incumbent upon the defendant to specify the causes of action

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required to be separately stated as it is upon the plaintiff to separately state them. We think the motion in this case was altogether too indefinite, and if proper objection had been made and insisted upon by plaintiff, instead of the objection that the paper filed was no motion at all, this court would probably arrive at a different conclusion than the one it feels compelled to adopt under all the circumstances of the case.

For the reasons above stated, the judgment is affirmed. Respondents to recover costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

HEADLUND v. DANIELS et al.

No. 3014. Decided September 24, 1917. (167 Pac. 1170)

1. **APPEAL AND ERROR—REVIEW—FINDINGS.** Where the evidence is not presented for review, findings of fact by the trial court must be presumed to be fully sustained by the evidence. (Page 387.)
2. **APPEAL AND ERROR—OPINION OF TRIAL COURT—CONSIDERATION.** Where the opinion of the trial court is settled in the bill of exceptions and is made a part of the record, the appellate court may look to it to ascertain the trial court's reasons for its decision, but such reasons do not amount to a judicial finding, and are without any judicial effect.¹ (Page 387.)
3. **CONTRACTS—ARCHITECTS—COMMISSIONS—EXCESS COST.** In an action by plaintiff, an architect, for commissions claimed, the court found that his plans and specifications for the remodeling of a theater were used, that plaintiff did not agree that the cost should not exceed a stipulated sum, but plaintiff told defendant after preparing preliminary plans that the cost should not exceed \$30,000, that the building when completed in accordance with the plans thereafter prepared and submitted cost in excess of \$77,000, but the excessive cost was not by reason of the carelessness, negligence, or incompetence of plaintiff, and that defendant was not damaged on account of any representations by plaintiff. *Held* that, there being a further finding that the contract between defendant and plaintiff which provided for payment of commissions was made in good faith and without any fraudulent representations or purpose, plaintiff was entitled to recover

¹ *Utah Com. Savings Bank v. Fox*, 44 Utah, 323, 140 Pac. 660; *Grand Cent. Min. Co. v. Mammoth M. Co.*, 29 Utah, 490, 83 Pac. 648; *Miller v. Marks*, 46 Utah, 257, 148 Pac. 412.

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commission not being for the excess in cost of the building.¹ (Page 388.)

4. JUDGMENT—ENTRY—PROVISIONS. The provisions of Comp. Laws 1907, section 3181, subd. 6, are directory and not mandatory, and hence the failure of plaintiff to demand entry of judgment within six months after the court rendered its oral decision does not preclude the court from thereafter entering judgment for plaintiff. (Page 389.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by J. A. Headlund against Max Daniels and others.
Judgment for plaintiff. Defendants appeal.

AFFIRMED.

Allen T. Sanford and *Soren X. Christensen* for appellants.
Carlson & Carlson and *Ray VanCott* for respondent.

CORFMAN, J.

This was an action brought by the plaintiff, an architect, in the district court of Salt Lake County, to foreclose a lien for services rendered the defendant Max Daniels in drawing plans and specifications and superintending the remodeling of a building commonly known as the Rex Theater, situate in Salt Lake City. The defendants other than Daniels were made parties because of their having, or claiming to have, some interest in the premises as lienholders or otherwise, and as to them it will not be necessary to here make further reference.

The amended complaint, in substance, alleges that a contract was entered into between the plaintiff and the defendant Daniels whereby the plaintiff was to prepare plans and specifications for, and superintend, the work in remodeling a theater building, for which services Daniels agreed to pay plaintiff 5 per cent. of whatever the total cost amounted to; that the plaintiff performed the services; that the cost of remodeling amounted to \$60,000; that Daniels had paid the plaintiff \$700 only, and there was a balance still due and owing the plaintiff

¹*Pack v. Wines*, 44 Utah, 427, 141 Pac. 105.

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of \$2,300 for which plaintiff had filed and recorded his lien against the premises, and for which plaintiff prayed judgment and decree of foreclosure.

The answer is voluminous. Briefly stated, it admits an agreement was entered into between plaintiff and Daniels as alleged in the complaint, except it denies that defendant was to pay the plaintiff 5 per cent. of the cost of remodeling the building should the amount be over \$30,000; admits the cost of remodeling was over \$60,000. For an affirmative defense, and by way of counterclaim, defendant alleges that the plaintiff had represented himself to the defendant to be a competent architect, capable of making estimates, drawing plans and specifications for theaters, and the doing of all things appertaining to the business of architecture; that the plaintiff had represented to defendant that the total cost of remodeling the theater would not exceed \$25,000 and guaranteed that under no condition would the cost exceed \$30,000; that the defendant had informed plaintiff he was financially unable to pay more and would not remodel the theater should it cost more than \$30,000; that during the course of remodeling the defendant had paid plaintiff \$700 as part payment for services rendered; that the representations of plaintiff to defendant as to the cost of remodeling the building were false and fraudulent; and that by reason of the carelessness, negligence, and incompetency of plaintiff the cost of remodeling the building was \$70,000. The answer alleges as a further defense, and by way of counterclaim, neglect in timely preparation of the plans and specifications for the building, various errors and defects of workmanship in its rebuilding and construction, with consequent loss and damage to plaintiff, for which defendant prayed judgment against plaintiff.

Plaintiff's reply denied the allegations of the counterclaim.

After trial to the court judgment and decree were awarded the plaintiff for the sum of \$376.60 (the same being a balance due as commission—\$800 less \$423.40—allowed defendant on his counterclaims), interest, attorney's fee and costs. Defendant appeals on the judgment roll.

As the case is presented to this court on appeal primarily but two questions are involved, namely: (1) Are the conclusions of law and judgment of the trial court warranted by its findings of fact? (2) Did the court err in refusing to dismiss the action upon defendant's motion, and in entering judgment for the plaintiff over defendant's objection on the ground that plaintiff failed and neglected for more than six months after he was entitled to have judgment entered to demand that it be entered?

(1) It is contended and argued by defendant in his brief that the judgment of the district court is wrong because the court found as a fact that the actual cost of the defendant's building was greatly in excess of the estimate of plaintiff; that the court should have awarded, under the facts found, the defendant damages, and denied the plaintiff any compensation for his services. The material findings of the court bearing on the validity of the judgment are as follows:

"(2) That on or about August 1, 1911, the plaintiff and defendant Max Daniels agreed together as follows: That the plaintiff draw plans and specifications for the remodeling, repair, and erection of that certain building commonly known as the Rex Theater and Hotel, situated upon that certain lot of land described in paragraph 1 of these findings of fact, and also superintend all work done on said building under said plans and specifications; that for the drawing of plans and specifications, as aforesaid, and also for superintending all work done under such plans and specifications, the said defendant Max Daniels should pay plaintiff, as compensation for his services, 5 per cent. of the total cost of the remodeling, repair, and construction of said building on said premises, provided, however, that the said 5 per cent. should not be reckoned on a cost in excess of \$30,000.

"(3) That in pursuance of said agreement plaintiff drew plans and specifications for the remodeling and construction of said building upon said premises and rendered services in superintending the remodeling, repair, and construction of said building under and according to the terms of said plans and specifications by plaintiff drawn, as aforesaid, and said

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plans and specifications were used by defendant Max Daniels in the remodeling, repair, and construction of said building.

• • •

“(13) That the plaintiff at all times mentioned in the defendant’s amended counterclaim advertised and represented himself to be a competent architect and capable of making estimates and drawing plans and specifications for the construction of buildings of various kinds and as competent to superintend the construction of the same; that between the 1st day of July and the 1st day of August, 1911, the plaintiff made certain estimates, calculations, and measurements as to the cost of remodeling and the reconstruction of the Rex Theater building upon said land described herein, and estimated to said defendant that the total cost for remodeling and reconstruction of said building would be about the sum of \$25,000, and that it would not cost to exceed the sum of \$30,000, exclusive of the sprinkler system, and thereafter plaintiff and defendant entered into an oral agreement whereby plaintiff agreed to draw plans and specifications for the repair, building, and remodeling of said theater, and it was agreed that for said services the plaintiff should receive $2\frac{1}{2}$ per cent. of the cost of the building for drawing the plans and specifications and $2\frac{1}{2}$ per cent. of the cost of the building for superintending the work of rebuilding, remodeling, and reconstructing the same, and it was further agreed that such percentage should not be paid on any of the cost exceeding the sum of \$30,000, and in no event should the fees of the plaintiff exceed the sum of \$1,500; that plaintiff did not agree nor guarantee that the cost of said building, exclusive of the sprinkler system, should not exceed the sum of \$30,000; that at the time of making said agreement the defendant informed plaintiff that he would not remodel and reconstruct said building if the same should cost more than said \$30,000, according to the designs and estimates given by plaintiff, and the defendant represented to plaintiff that he was not financially able, without great inconvenience and loss to his other interests, to invest more than \$30,000, aside from the cost of the sprinkler system, in remodeling said building; that plaintiff

said to the defendant that said building should not cost more than said sum of \$30,000; that at the time of such estimate and the entering into of said agreement the plaintiff had prepared only what was referred to in the evidence as the preliminary plans. * * *

“(15) That said building, when completed in accordance with the plans which were submitted by plaintiff to the defendant Daniels at and prior to the time the defendant employed plaintiff as architect, and in accordance with the plans and specifications which were thereafter prepared and submitted by plaintiff to the defendant Daniels, cost in excess of \$77,000, but said excessive cost was not by reason of the carelessness, negligence, or incompetency of the plaintiff in the execution of the remodeling, alteration, or reconstruction of said building, except as herein specifically found; but the plaintiff did at and prior to the time the plaintiff and defendant entered into said agreement, estimate that said building as completed, aside from the sprinkler system, would cost not to exceed \$30,000. * * *

“(27) That prior to the time of entering into the contract between plaintiff and defendant the plaintiff estimated and stated to the defendant that the entire work which was to be done, exclusive of the sprinkler system, would cost the defendant not to exceed the sum of \$30,000, and by reason of said estimate the defendant determined to proceed with said remodeling, alterations, and new construction, and the same was constructed substantially as it was understood the same should be at the time of said estimate, in so far as the plans of said remodeling, alteration, and new construction had then been determined upon; that the plaintiff did not represent that by the expenditure of said sum of \$30,000, or any other sum the defendant would receive the rental from said buildings as the same now stands; nor was the defendant damaged on account of any representations, estimates or statements made by the plaintiff in the sum of \$47,000 or any other sum or at all. * * *

“(34) Nor did the plaintiff well know that the same would cost more, nor did said plaintiff make said representations or

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any representations fraudulently with the purpose of inducing the defendant to start said work, to the end that the plaintiff might thereby secure his commission upon said work; that the contract made between plaintiff and defendant was made in good faith and without any fraudulent representations, statements, or purpose whatsoever."

From the foregoing facts found the court concludes:

"That the plaintiff is entitled to have and recover of and from said defendant Max Daniels the balance of his commission, to wit, \$800, less the sum of \$423.40, to which the defendant Max Daniels is entitled to have and recover from said plaintiff as a set-off on account of his counterclaims herein against said plaintiff, thereby leaving the plaintiff entitled to have and recover of and from said defendant Max Daniels the sum of \$376.60, with interest at the rate of 8 per cent. per annum amounting to the sum of \$87.73, together with \$25 attorney's fees and \$10 as the cost for preparing and recording his lien herein, aggregating \$499.33."

The testimony given at the trial bearing on the issues involved in this controversy is not presented here for review; therefore we must assume that the findings of fact made by the trial court are fully sustained by the evidence. True, where as here, the opinion of the trial court is 1, 2 settled in the bill of exceptions and is made a part of the record on appeal to this court, we may look to it to ascertain the court's reasons for its decision; but, as this court has repeatedly held, the trial court's reasons for a decision do not amount to a judicial finding and are without any judicial effect whatever. *Utah Com. Savings Bank v. Fox*, 44 Utah, 323, 140 Pac. 660; *Grand Cent. Min. Co. v. Mammoth M. Co.*, 29 Utah, 490, 83 Pac. 648; *Miller v. Marks*, 46 Utah, 257, 148 Pac. 412. We therefore must indulge in the presumption here that the evidence in the case justifies the trial court's findings all of which negative the contention of the defendant that, as matter of law, the plaintiff is not entitled to any compensation for the services rendered the defendant and the plaintiff should have been held to answer in damages to the defendant.

If the facts as found by the trial court were to the effect that the plaintiff by his estimate wrongfully represented to the defendant that the building in question could be remodeled at a cost not to exceed \$30,000, and the defendant, relying on the estimate, was induced to proceed with the remodeling at the excessive cost of \$77,000, the question raised by defendant's appeal would, as matter of law, be of easy determination. This court, in the case of *Pack v. Wines*, 44 Utah, 427, 141 Pac. 105, has there announced its decision in harmony with the rule as contended for by defendant and as laid down in 6 Cyc. 31, and in *Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 127, and other authorities cited in defendant's brief. It will be readily seen, however, that in the case at bar the trial court, by its findings of fact, has expressly negatived the grounds upon which those decisions were predicated and the doctrine announced. In the case at bar the court expressly finds:

(a) "Said plans and specifications were used by defendant Max Daniels in the remodeling, repair, and construction of said building; (b) that plaintiff did not agree nor guarantee that the cost of said building, exclusive of sprinkler system, should not exceed \$30,000"; (c) "that plaintiff said to the defendant that said building should not cost more than said sum of \$30,000; that at the time of such estimate and the entering into of said agreement the plaintiff had prepared only what was referred to in the evidence as the preliminary plans"; (d) "that said building, when completed * * * in accordance with the plans and specifications which were thereafter prepared and submitted by plaintiff to the defendant Daniels, cost in excess of \$77,000 *but said excessive cost was not by reason of the carelessness, negligence, or incompetency of the plaintiff in the execution of the remodeling, alteration, or construction of said building, except as herein specifically found*" (italics ours); (e) "nor was the defendant damaged on account of any representations, estimates or statements made by the plaintiff in the sum of \$47,000, or any other sum. or at all"; (f) "that the contract made between plaintiff and

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defendant was made in good faith and without any fraudulent representations or purpose whatever."

If we are to indulge in the presumption that the foregoing facts are supported by the testimony at the trial, and, for the purposes of this case, as heretofore pointed out, we must, then the contention made by defendant that the plaintiff was not entitled to compensation for services rendered fails, especially when, as the record shows, the defendant permitted the plaintiff to continue in his employment and received the benefits of his services until the final completion of the building.

While the question has not been expressly raised in the case at bar, we are not prepared to say that, as matter of law, under any circumstances where a party knowingly continues the employee in unsatisfactory service and receives the benefits he is not thereby estopped from refusing payment on the grounds that the services rendered were damaging and unsatisfactory.

The preliminary statement or estimate made by the plaintiff as an architect to the defendant that the cost of remodeling the building would not exceed \$30,000, when in fact the total cost was over \$77,000, in the absence of the testimony before this court accounting for the tremendous increase in cost, in our opinion, does not warrant this court, in view of the findings of the trial court, in saying the conclusions of law and judgment are erroneous and contrary to law. Such damages as were awarded the defendant on his counterclaim are supported by the trial court's findings. For this court to here say defendant was entitled to greater damages would be to say the court's findings of fact are not sustained by the evidence. The evidence is not before us, and therefore this we cannot do.

The second contention made by defendant that the court erred in refusing to dismiss plaintiff's action upon the defendant's motion, and that the court erred in entering judgment over defendant's objection because the judgment was not entered within six months after the court rendered its oral decision, is without merit. The provisions of Comp. Laws 1907, section 3181, subd. 6, are directory, not mandatory, upon the court.

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"Statutes requiring that judgment shall be entered within a limited time after the rendition of a verdict or other determination of the cause are generally directory only." 23 Cyc. 829; *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515.

For the reasons assigned the judgment of the district court must be affirmed.

It is so ordered. Costs to respondent.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

**ZENGER v. CIGARMAKERS' UNION NO. 224 OF CIGAR-
MAKERS' INTERNATIONAL UNION OF AMERICA**
(Zenger, Intervener)

No. 3067. Decided September 24, 1917. (167 Pac. 1174.)

INSURANCE—MUTUAL BENEFIT ASSOCIATION—DESIGNATION OF BENEFICIARY—VALIDITY. Where the laws of a union paying a death benefit required designation of beneficiary to be in writing and witnessed, a designation in writing of the mother of deceased, but unwitnessed when accepted by union, was valid, and the wife of the member whom he subsequently married was not entitled to the fund under a provision that in the absence of designation the wife should be the beneficiary.

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by Mrs. Jennie Zenger against the Cigarmakers' Union of Cigarmakers' International Union of America, wherein Mrs. Hattie Zenger intervened.

Judgment for intervener, and plaintiff appeals.

AFFIRMED.

Hancock & Barnes for appellant.

W. R. Hutchinson for respondent.

Weber & Olson for Cigarmakers' Union.

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FRICK, C. J.

The plaintiff, Mrs. Jennie Zenger, as the surviving widow of Eugene J. Zenger, brought this action against the Cigar-makers' Union No. 224, hereinafter called defendant, to recover a certain death benefit to which, by reason of the death of said Eugene J. Zenger while a member of the defendant in good standing, she alleged she was entitled. Mrs. Hattie Zenger, mother of the deceased, intervened in the action and claimed said benefit upon the ground that she was by said deceased, designated his beneficiary. The defendant appeared in the action, admitted that a certain amount was due to the beneficiary of the deceased and paid the amount into court, subject, however, to the order of the court.

The cause was tried and submitted to the district court of Salt Lake County without a jury. At the conclusion of the trial the court, in substance, found that the defendant is a voluntary association which pays a limited amount of benefits to the beneficiaries of its members; that Eugene J. Zenger in his lifetime was a member of the defendant; that at the time he became a member "he made a designation in writing upon one of the blanks of said Union [the defendant] naming his mother, Hattie Zenger, the intervener herein, of Salt Lake City, Utah, his beneficiary"; that said Eugene J. Zenger died February 27, 1915, and at his death was a member of the defendant in good standing, and that there was payable by said defendant, as death benefits, to Hattie Zenger, the sum of \$149.25; that the written designation of the beneficiary made by the deceased was in the possession and control of the secretary of the defendant during all of the time from the time it was made until it was delivered by said secretary to said Hattie Zenger after the death of her son, Eugene J. Zenger; that the defendant paid said sum of \$149.25 to the clerk of the court subject to the order of the court, and that the same belongs to said Hattie Zenger; that Jennie Zenger, the plaintiff, is not entitled to said money nor to any part thereof.

Conclusions of law and judgment were accordingly made and entered in favor of the intervener, Hattie Zenger. The plaintiff appeals.

It further appeared from the undisputed evidence that at the time deceased became a member of the defendant he was unmarried and that while single he designated his mother, Hattie Zenger, as his beneficiary; that thereafter he married Jennie Zenger, the plaintiff, and that she, with an infant son about eight years of age, survived him; that the constitution of the defendant, upon the subject of beneficiaries and their designation, provides as follows:

“A member may at any time designate the person or persons to whom his death benefit shall be paid. Such designation shall be in writing, signed by such member and witnessed by the secretary of the local union to which such member then belongs, or by two other credible persons, and such member may, at any time thereafter, in like manner change such designation. If there be no such designation or if the paper making such designation be not deposited with the president of the International Union within 30 days after the death of such member, such benefits shall be paid to the widow of such deceased member; if there be no widow, then the minor children of such deceased member, and if there be no widow and no minor children of such deceased member, then to any relatives of the deceased member who at the time of his death were dependent for support in whole or in part upon such deceased member.”

It further appeared that the deceased, in designating his mother as his beneficiary, made the same in writing on one of the blanks provided by the defendant for that purpose and signed his name thereto, but the designation was not witnessed by the secretary of the defendant nor by “two other credible persons” as provided in the constitutional provision we have quoted. No other designation was ever made or attempted by the deceased.

Upon the foregoing facts, counsel for plaintiff insist that the benefit was payable to her as the widow of the deceased, and that the court erred in awarding it to the mother. We give counsel's statement of the question presented for decision in their own language, which is as follows:

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"The sole question to be decided herein is as follows: Does the death benefit from the union to which deceased belonged go to his mother or to his widow, when the designation of his mother as beneficiary, made before his marriage, did not comply with the constitution of the union requiring witnesses, and when the constitution and by-laws of the union provide that in case no beneficiary is designated the benefit goes to his widow?"

It is quite clear that in making his designation of a beneficiary the deceased did not fully comply with the provisions of the constitution of the defendant covering that subject. The question, therefore, is, does the fact that neither the secretary nor "two other credible persons" witnessed the designation made by the deceased amount to a failure to designate any beneficiary under the constitutional provision we have quoted? The designation in this case was in writing, was in due form, and was duly signed by the deceased. All of the essentials required by the constitution were therefore complied with, except that the designation was not executed in due form by reason of not being witnessed. There was no doubt respecting whom the deceased chose as a beneficiary in case of his death. The designation was in writing duly signed, but not witnessed. The designation, therefore, was lacking in a mere formality. Does that, standing alone, make it invalid? What the effect would be if the defendant were here assailing the validity of the designation it is not necessary to determine, since the defendant makes no objection to the designation. Indeed, it has waived all objections by paying the money into court. The question, therefore, is, can the plaintiff avail herself of a formal defect in the written designation of the deceased? The author of Bacon, Ben. Soc., etc., after discussing the proposition now under consideration at some length, in volume 1, section 239, states the law as follows:

"It is now settled that defects or irregularities in the designation or change of beneficiary may be waived by the lodge, although it has been held that the required formalities in the laws of the society relative to designation of beneficiary are part of the contract and must be strictly complied with."

In the same volume, at section 308, the author again refers to the subject, and he there says that it is "well settled that the society may waive compliance with the required formalities" of designating or changing beneficiaries by the members.

In 29 Cyc. 118, the law is very clearly stated in a few words. It is there said:

"As a rule, no one but the society may question the validity of the designation of a beneficiary because of the member's failure to comply with the society's rules in regard to the mode of designation."

The foregoing text is fully supported by the decisions of the courts. Among others the following will be found to be directly in point: *Hanson v. Minnesota Scandinavian Ass'n*, 59 Minn. 123, 60 N. W. 1091; *Tepper v. Royal Arcanum*, 61 N. J. Eq. 638, 47 Atl. 460, 88 Am. St. Rep. 449; *St. Louis Police Relief Ass'n v. Tierney*, 116 Mo. App. 447, 91 S. W. 968; *Manning v. Ancient Order of U. W.*, 86 Ky. 136, 5 S. W. 385, 9 Am. St. Rep. 270; *Marsh v. Supreme Council, etc.*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; *Southern, etc., Ass'n v. Laudendbach* (Sup.) 5 N. Y. Supp. 901. In *Sheehan v. Butchers', etc., Ass'n*, 142 Cal. 489, 76 Pac. 238, it was held that where a member designated his mother, and thereafter married, the designation of the mother continued in full force and effect, notwithstanding the subsequent marriage; and in *Maneely v. Knights, etc.*, 115 Pa. 305, the same result was reached in a case where the member's sister had been designated and the wife claimed the benefit at the death of the member.

The foregoing cases are all well considered, and the question is viewed from every angle, and in all, except the last two, it is squarely held that where, as here, the laws of the order did not control the member in choosing his beneficiary, no one but the society can take advantage of informalities in designating or in changing the beneficiary.

With regard to whether the subsequent marriage of the members revokes a former designation of a beneficiary, in 29 Cyc. 124 it is said: "The fact that a member, after having designated a beneficiary, marries a third person does not operate to revoke the designation."

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It is not necessary to pursue the subject farther. We desire to add, however, that we have carefully read all the cases cited by counsel for appellant. The principal ones are the following: *Sanger v. Rothschild*, 50 Hun, 157, 2 N. Y. Supp. 794, which case was affirmed in 123 N. Y. 577, 26 N. E. 3, *Loewenthal v. District Grand Lodge, etc.*, 19 Ind. App. 377, 49 N. E. 610, and *Weinestein v. Weinestein*, 120 App. Div. 496, 104 N. Y. Supp. 1113. All of those cases are, however, clearly distinguishable from the case at bar and from the ones we have cited as supporting the texts quoted from Bacon and Cyc. It is not necessary to cite or refer to the other cases cited by counsel, since none of them have any application to facts like those in this case.

From what has been said it follows that the judgment should be, and it accordingly is, affirmed, with costs to respondent.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

KETCHUM COAL CO. v. PLEASANT VALLEY COAL
CO. et al.

N. 3072. Decided September 26, 1917. (168 Pac. 86.)

1. EMINENT DOMAIN—DECISIONS REVIEWABLE—"FINAL JUDGMENT."
In a proceeding to condemn land, where judgment denies condemnation of a substantial part of the land desired, plaintiff may appeal therefrom without waiting until damages are assessed. (Page 399.)
2. PUBLIC LANDS—DECISIONS OF LAND OFFICE—COLLATERAL ATTACK.
In absence of fraud, the findings and decisions of the officers of the land office in a land contest cannot be collaterally attacked by one claiming through the predominating party in such contest. (Page 407.)
3. MINES AND MINERALS—ACQUISITION AND TRANSFER BY ONE DISQUALIFIED FROM HOLDING TITLE. One disqualified from holding title to coal lands could receive a title from a person having it, and transfer it to another who can lawfully take it. (Page 409.)
4. ESTOPPEL—AFTER-ACQUIRED TITLE—CONVEYANCES BEFORE PATENT.
One who conveys coal lands, before he has applied to the government to purchase the same, conveys a good title thereto, if he subsequently acquires the land, under Comp. Laws 1907, section 1979, relating to after-acquired titles. (Page 410.)
5. ESTOPPEL—SALES OF LAND—PERSON CLAIMING UNDER VENDOR. One who is claiming with full knowledge of the facts under a person who

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has sold land and abided by the sale for twenty-five years, and the land has been improved, is estopped to deny that the transfer was valid. (Page 411.)

6. PUBLIC LANDS—CONVEYANCE TO DISQUALIFIED PERSONS—STATUTES. U. S. Comp. St. 1916, section 5025, making void land entered by one for another, has no bearing, where the patent was lawfully acquired, but was conveyed to one disqualified from holding title. (Page 411.)
7. EMINENT DOMAIN—COAL COMPANIES—TRIPPLE SITES. Coal companies, under the statute, have the right to condemn ground for a tripple site, for screening, grading, handling, and loading coal on cars. (Page 414.)
8. EMINENT DOMAIN—PROPERTY SUBJECT—RAILROAD RIGHTS OF WAY. A coal company cannot condemn any portion of a right of way used for railroad purposes for a tripple site, either under the law generally, or under Comp. Laws 1907, section 3590, subsec. 5, relating to crossings, intersections, and connections. (Page 414.)
9. PUBLIC LANDS—RIGHTS OF WAY—PURPOSES AND USES. A right of way granted by Congress and devoted to transportation by a common carrier cannot, either with or without the consent of the carrier, be devoted to permanent structures such as tipples for a coal company.¹ (Page 417.)
10. EMINENT DOMAIN—COAL COMPANIES—DEDICATED RIGHT OF WAY. Although a track departs from a right of way, it cannot be approached, by a coal company condemning land for a tripple site, so close as to interfere with traffic, and five feet is not an unreasonable minimum distance. (Page 418.)

Appeal from District Court, Seventh District; *Hon. A. H. Christensen*, Judge.

Condemnation proceedings by the Ketcham Coal Company against the Pleasant Valley Coal Company, the Denver & Rio Grande Railroad Company and the Guaranty Trust Company.

Judgment allowing partial condemnation only. Plaintiff appeals.

AFFIRMED.

Boyd, Devine & Eccles and *Walton & Walton* for appellant.

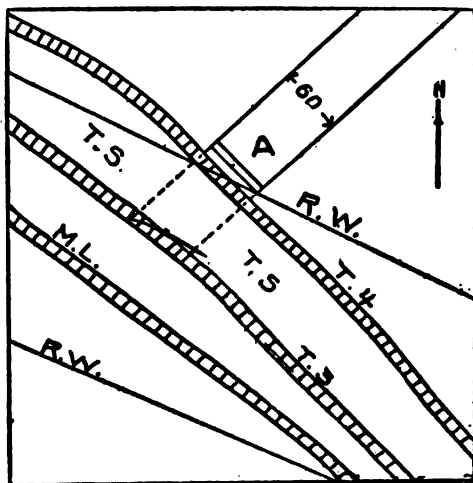
Van Cott, Allison & Riter and *Ellis, Schulder & Lucas* for respondents.

¹*Postal Tel. & Cable Co. v. O. S. L. E.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705.

Appeal from Carbon County, Seventh District

FRICK, C. J.

Proceedings arising out of different phases of this case have been considered by us twice before. *Ketchum Coal Co. v. Christensen*, 48 Utah, 214, 159 Pac. 541; *Ketchum Coal Co. v. District Court*, 48 Utah, 342, 159 Pac. 737. In both of those proceedings merely preliminary questions were involved. After the preliminary questions had been settled by this court, the case was finally heard upon the merits by the district court of Carbon County, which granted the claims of the plaintiff as against the defendant Pleasant Valley Coal Company in part and as against said company denied them in part; and as against the Denver & Rio Grande Railroad Company plaintiff was denied all relief. The principal defendants in this action are the Pleasant Valley Coal Company, hereinafter called P. V. C. Co., and the Denver & Rio Grande Railroad Company, hereinafter designated Railroad Co. The other defendants are merely mortgagees and need not be further mentioned. The action was commenced by the plaintiff to condemn a certain strip of ground over certain lands belonging to the P. V. C. Co., and also to condemn a portion of the right of way of the Railroad Co. We here insert a rough sketch which illustrates just what the plaintiff seeks to obtain in this action:



The sketch is supposed to cover precisely forty acres of land. North of and adjoining the forty acres shown on the plat the

P. V. C. Co. owns another forty acres, and another forty acres west of and adjoining the last-named forty acres. It also owns another forty acres immediately south of and adjoining the forty acres shown on the plat. The P. V. C. Co. thus claims to own four forties lying in the shape of an L, the long stem of which extends north and south. The Railroad Co. owns a right of way 200 feet in width over the forty acres shown on the plat, the boundaries of which are indicated by the lines marked "R. W." The Railroad Co. owns and operates a number of tracks on its right of way, three of which are shown on the plat. The most northerly one is marked "T. 4," the next one to the south is marked "T. 3," and the one still farther south is marked "M. L." which is the main line. The plaintiff owns eighty acres of coal land on which it operates a coal mine which adjoins the P. V. C. Co.'s land on the east, and the northeast corner of the forty acres shown on the plat connects with the southwest corner of plaintiff's eighty acres. The plaintiff desires to condemn a strip of ground sixty feet in width and between 1,300 and 1,400 feet in length over the P. V. C. Co.'s land shown on the plat. The strip sought to be condemned is marked "A" on the plat, and it is desired to be used for tramways, tunnels, etc., for the purpose of transporting coal which the plaintiff mines from its coal mine on the ground lying to the north and east of the P. V. C. Co.'s land as aforesaid. The plaintiff, in connection with said strip "A," also seeks to condemn a strip of ground containing 1.42 acres, a large part of which is on the Railroad Co.'s right of way, for a tipple site. The strip sought to be condemned for that purpose lies between track No. 3 and Track No. 4, and is marked "T. S.—T. S." on the plat. The plaintiff also sought to extend the sixty-foot strip southward on the railroad right of way, as indicated by the broken lines on the plat. Both the plaintiff and the P. V. C. Co., however, concede the Railroad Co.'s title for railroad purposes to the right of way as indicated by the line "R. W." The objects indicated on the plat are all greatly enlarged so as to be more readily understood.

On the hearing, the district court found the title to the whole 160 acres, not included within the Railroad Co.'s right

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of way, to be in the P. V. C. Co.; found that the Railroad Co. had title from the United States government to the right of way; and found that the plaintiff did not have title to any of the 160 acres. We shall refer to the question of title again later in this opinion. The district court limited plaintiff's right to condemn as follows: The court denied plaintiff's claim to condemn any part of the Railroad Co.'s right of way for a tippie site and refused to extend the sixty-foot strip on to the right of way, but allowed the plaintiff the right to condemn said strip only to within five feet of the outer rail of track No. 4 indicated on the plat. It will be observed that track No. 4 departs from the right of way at the point where the sixty-foot strip connects with said track. The district court, however, limited plaintiff's right to condemn to a point approximately five feet north from the northerly rail of track No. 4, as indicated by the double line on the plat. The district court entered judgment condemning the sixty-foot strip over the P. V. C. Co.'s land to the point aforesaid, and also entered judgment denying plaintiff all other right to condemn, and dismissed the action as against the Railroad Co. The plaintiff appeals from the judgment.

Counsel for the defendants have filed a separate motion on behalf of each defendant, to dismiss the appeal, upon the ground that the judgment appealed from is not a final judgment and hence is not appealable. It is argued with much force by counsel for the defendants that the judgment appealed from does not finally determine and dispose of all the questions involved, for the reason that the question of damages to which the P. V. C. Co. may be entitled for the value of the strip which the court condemned, and for incidental damages, is left undetermined. It is quite true that the plaintiff appealed before proceeding to assess the damages to which the P. V. C. Co. may be entitled in case plaintiff continues in possession and use of the strip condemned by the court. It should, however, be kept in mind that the plaintiff was given the right to condemn only a portion of the land it sought to condemn, and was denied the right to condemn any land for a tippie site as against the Railroad Co.

If the court had denied the plaintiff's right to condemn anything, the question regarding the right of appeal would be entirely free from doubt and difficult. Inasmuch as the court has granted plaintiff's claim in part, however, it is contended by the defendants that the judgment is not final until the damages have been assessed for the land ordered condemned. Now, it may well be that the plaintiff does not desire the strip ordered condemned unless it can likewise obtain the proposed tippie site in connection therewith. Suppose condemnation proceedings were instituted by a railroad company for a right of way, including ground for side tracks and station grounds, and the trial court limited its right to condemn to a strip twenty-five feet in width, an amount wholly insufficient for the needs of the company for the purposes aforesaid. Would the company be required to assess damages for a strip of ground it did not want, and which was wholly inadequate for its needs, before appealing to this court? Would not the trial court's action in such case be equivalent to denying the company the right to condemn? True, the case at bar is not precisely parallel to the supposed case, but the difference is one of degree and not of principle. Here, as in the supposed case, the plaintiff may not desire the sixty-foot strip at all, unless it can obtain the ground it sought for a tippie site in connection therewith. But if it be assumed that it would, nevertheless, take what it could get, yet, under the facts and circumstances, it should not be required to assess damages until it has been finally determined by the appellate court just what, under the law, it may condemn. In the case of *Ketchum Coal Co. v. District Court*, supra, we, in effect, held that the question of ownership of the ground sought to be condemned and affected by the condemnation proceedings must be determined before the damages could properly be assessed. It is just as essential that the right to condemn, and the extent that the right may be exercised, be determined before proceeding to assess the damages. If that be not done, then, as pointed out in the case last referred to, this case must be determined by piecemeal. True, we said in the former case that to constitute a final judgment the case must be determined as to all parties.

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That language is, however, used and must be considered in the light of the issues there presented and in connection with all that was said. We also there said that cases cannot be split up and considered piecemeal. Now, if the contention of the defendants shall prevail in this case, and the plaintiff should finally succeed in its contention by having this court modify the judgment of the district court by condemning the ground claimed by plaintiff for a tippie site, then the damages would have to be assessed twice, once for the strip ordered condemned by the trial court and once for the additional strip ordered condemned by this court for a tippie site, a part of which is owned by the Railroad Co. and another part by the P. V. C. Co. This would compel the plaintiff to try the case by piecemeal, which we held in the proceeding last referred to should not be done.

Counsel for the defendants, however, cite a large number of cases in which they contend it has been held that the judgment in the case at bar is not a final and hence not an appealable judgment. Among other cases, they cite and rely on the following: *Burlington & C. R. Co. v. Colo. E. R. Co.*, 45 Colo. 222, 100 Pac. 607, 16 Ann. Cas. 1002; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194; *Traction Co. v. Schenk*, 73 W. Va. 226, 80 S. E. 345; *Ludlow v. City of Norfolk*, 87 Va. 319, 12 S. E. 612; *Hendrick v. Railroad*, 98 N. C. 431, 4 S. E. 184; *Forest Cemetery Ass'n v. Constans*, 70 Minn. 436, 73 N. W. 153; *Duluth Tr. Ry. Co. v. Duluth Terml. Ry. Co.*, 81 Minn. 62, 83 N. W. 497; *Atley v. Commissioners*, 77 Ohio St. 285, 82 N. E. 1079; *In re Minn. & Wis. Ry Co.*, 103 Wis. 191, 78 N. W. 753; *Crompton Carpet Co. v. Worcester*, 119 Mass. 375; *Matter of Grab*, 157 N. Y. 69, 51 N. E. 398; *Chicago Tr. Co. v. Preucil*, 236 Ill. 491, 86 N. E. 117; *Tacoma v. Nisqually Power Co.*, 54 Wash. 292, 103 Pac. 49. We have given all of the cases referred to by counsel which directly refer to the proposition contended for by them. In not a single one of those cases is the question now under consideration passed on. The case which most nearly approaches the question is the one from Colorado, the first one cited. In that case, however, the court entered judg-

ment condemning all that the condemner asked to be condemned, and the condemnee attempted to appeal to the Supreme Court before the damages were assessed. If that were the case here, that is, if the district court had entered judgment condemning all that the plaintiff sought to condemn, or so much that it might be said that it obtained practically all it asked for, we should not hesitate to deny the defendants the right to appeal before the damages were assessed. If, in such a case, an appeal were allowed, it would result in splitting the action, in that it would authorize an appeal while the question of damages was still undetermined. To deny the appeal in this case, however, would likewise result in splitting the action, for the reason that plaintiff's right to condemn has been denied in a material part, and hence damages could only be assessed for the part condemned, and the assessment for the remaining part asked to be condemned, if allowed by this court, would have to be postponed until after this court had determined the right to condemn. The plaintiff would thus not be permitted to assess the damages at one time and by the same jury. As before stated, however, the cases cited by counsel do not sustain their contention. In *Luxton v. North River Bridge Co.*, supra, the United States Supreme Court held that an order appointing commissioners to assess the damages for lands sought to be condemned was not a final judgment and hence not appealable. In *Ludlow v. City of Norfolk*, supra, it is said:

A "judgment appointing commissioners to fix a just compensation for land proposed to be taken in condemnation proceedings is not final and appealable."

It is only necessary to say that all the other cases are precisely to the same effect. What is said by the Supreme Court of North Carolina in *Hendrick v. Railroad*, supra, is quite significant. In that case the court held that an order appointing commissioners to assess damages in a condemnation proceeding is not a final judgment. The court, however, said:

"The order appealed from (however) is very different from that in the similar case of *Chick v. The Railroad Co.* (98 N. C. 390, 4 S. E. 183), decided at the present term; in the latter the court denied the motion for an order appointing commissioners and dismissed the proceeding,

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thus putting an end to the right of the plaintiff therein, and therefore an appeal lay in that case."

In that case, therefore, the true distinction is recognized and pointed out. If the right to condemn is denied in toto, there can be no doubt respecting the condemner's right to appeal, and if it is denied in a substantial and material part, so that what is allowed is not what the condemner seeks or requires, then again there should be no doubt respecting his right of appeal. In either case what he seeks is denied him, and the denial is final and conclusive unless reversed on appeal. Moreover, in case the whole claim is denied no damages can be assessed, and in case it is only partly denied it results in splitting the case so far as assessment of damages is concerned, and, under certain circumstances, might make it quite impracticable, if not impossible, to intelligently pass upon the question of damages.

Counsel for plaintiff have, however, also cited cases in which they contend it has been held that condemnation proceedings, under certain circumstances, are divisible, and that appeals will lie before the whole case is finally determined. They cite *In re St. P. & N. W. Ry. Co.*, 34 Minn. 237, 25 N. W. 345; *State v. Oshkosh, etc., Ry. Co.*, 100 Wis. 538, 77 N. W. 193; *City of Bluefield v. Bailey*, 62 W. Va. 304, 57 S. E. 805; *Wheeling, etc., Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967; *McLean v. District Court*, 24 Idaho, 441, 134 Pac. 536, Ann. Cas. 1915D, 542; *Jackson v. Jackson*, 175 Fed. 710, 99 C. C. A. 286; *Potter v. Beal*, 50 Fed. 860, 2 C. C. A. 60; 3 C. J. 356; 2 R. C. L. 42; 2 Lewis, Eminent Domain, 803. The case cited from Minnesota was expressly overruled by the Supreme Court of Minnesota in the cases referred to in defendants' citations from that state. While some of the other cases cited are more or less in point upon plaintiff's contention, yet in none of them is the precise question here involved decided. In 3 C. J. 448, it is said:

"There are many cases in which it has been held that a decree may be final in the sense that it may be appealed from although not final in the strict technical sense of the term, and in which, where the court has finally adjudicated part of the merits, the judgment, order, or decree has been held quoad hoc final and appealable."

In 3 Words and Phrases, 2781, where numerous definitions of final judgments are given, it is said:

“An exact definition of a final decree applicable to all cases possible to arise in practice is not easily given. It is not always necessary to dispose of the entire merits of the cause and all the parties before the court as a necessity to a final decree upon certain particular conceded or established rights.”

In that connection it is further said:

“The finality of a decree is not determined by the state of the suit at the time it is rendered, but upon whether it concludes a party in imposing on him a liberty or depriving him of a right.”

See, also, *Tucker v. Yell*, 25 Ark. 420-432, where an interesting discussion respecting what constitutes a final judgment for the purposes of appeal will be found. The excerpt quoted from 3 Words and Phrases is taken from that case. See, also, *Alexander v. Bates*, 127 Ala. 328, 28 South. 415-419.

In *Sharon v. Sharon*, 67 Cal. 196, 7 Pac. 463, it is said:

“A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question.”

The foregoing principle is illustrated and applied by this court in the cases of *Bristol v. Brent*, 35 Utah, 213, 99 Pac. 1000, and *Parsons v. Parsons*, 40 Utah, 602, 122 Pac. 907. We need not pause now to show that the principle announced in those two cases is clearly applicable here.

We are aware that in *Re Kelsey*, 12 Utah, 393, 43 Pac. 106, the Utah Territorial Supreme Court refused to follow the case of *Sharon v. Sharon*, supra, but that in no way affects the principle contained in the excerpt quoted from the Sharon Case; nor does it in the least affect the doctrine laid down by this court in the Bristol and the Parsons Cases.

It is not necessary to pursue the authorities further. We have no desire to depart from the wholesome and salutary rule constantly adhered to by this court that appeals will be permitted only from final judgments; yet neither do we desire to lay down a rule in that respect which would result in sacrificing substance for mere shadow. This case is an illustration that circumstances and conditions may arise where both common sense and justice unite in requiring that an appeal be allowed before every question that may be involved

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in a particular case is finally determined. In the case at bar it must be apparent to all that if this appeal should be dismissed the plaintiff would be required to assess damages for property it may not desire at all if, ultimately, the questions on appeal are determined against it. Moreover, the questions that are included in the court's judgment, so far as the right to condemn is concerned, are conclusive unless reversed.

It follows, therefore, that the motions to dismiss the appeal should be, and they are accordingly, denied.

We now proceed to a consideration of the merits, and in doing so we shall first discuss the question of title.

Both the plaintiff and the defendant P. V. C. Co. claim title to the 160 acres of coal land in question from the same source. It is more convenient to consider the P. V. C. Co.'s title first.

The following facts are found by the court and are not disputed. On May 14, 1888, the 160 acres in question were vacant, unoccupied coal lands of the United States, open to entry, exploration, and purchase. On that day one Stephen R. Marks, a citizen of the United States, of lawful age, filed his coal declaratory statement as provided by the United States statute (Act Cong. March 3, 1873, c. 279, section 1, 17 Stat. 607 [U. S. Comp. St. 1916, section 4659]), and, in compliance therewith, on March 29, 1889, made application to purchase said land. His application to purchase was protested by one Sprunt upon the ground that the application was made on behalf of the P. V. C. Co. Upon a hearing on the protest in the United States local land office, it was found that Sprunt's protest was not well founded and therefore it was not sustained. An appeal from the findings and decision of the local land office was taken to the United States Commissioner of the General Land Office where the decision was affirmed. Thereafter, and pursuant to the application to purchase, Marks, on October 2, 1890, entered and paid the purchase price for said land to the United States government and received a receipt showing payment. Thereafter, on June 5, 1891, the government duly issued a patent to Marks for said land. Before Marks had made the application to purchase,

however, as aforesaid, and before paying for said land, he, on October 25, 1888, by deed, conveyed the same to one Williams, which deed was duly recorded in the proper office in Emery County, Utah, which county then embraced the territory in question. On October 2, 1890, the wife of Mr. Marks, by deed, duly relinquished her dower right in and to said land to said Williams, which deed was recorded in the county aforesaid on October 28, 1890. On October 26, 1888, said Williams, by deed, conveyed said land to one Goss, which deed was duly recorded June 28, 1890, in said Emery County. On December 10, 1890, the wife of said Williams, by deed, duly relinquished her dower right in and to said land to said Goss, which deed was recorded in said county May 6, 1891. On April 8, 1892, said Goss and wife, by deed, conveyed said land to the defendant P. V. C. Co. On February 25, 1893, upon the execution and delivery of said last-named deed, the P. V. C. Co. went into possession of said land and since then, as the owner, has been in continuous and exclusive possession thereof. After the P. V. C. Co. had taken possession of said land Marks surrendered and delivered his patent issued to him to said company, which had the same recorded on March 28, 1893, in the records of Emery County. The court also found that "for upwards of twenty-five years prior to the commencement of this suit, the defendant Pleasant Valley Coal Company has been in the actual and exclusive possession of the whole of said property, both by actual occupancy as well as under claim of title, exclusive of other right, founded upon the aforesaid deeds of conveyance," and that during all of said time has paid all of the taxes assessed on said land, and, "as owner, has held and occupied the same openly, notoriously, and adversely, against the whole world and in good faith." We remark that the finding respecting adverse possession is assailed by the plaintiff.

As stated at the commencement of this opinion, the Railroad Co. claims title to its right of way from the United States through an act of Congress. In view that the title to the right of way of the Railroad Co. is conceded by the plaintiff, further reference to the title thereof is unnecessary.

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Plaintiff also claims the paper title to said 160 acres of coal land, subject, however, to the right of way of the Railroad Co. for railroad purposes. The plaintiff's title is also deraigned from the same Stephen R. Marks from whom the P. V. C. Co. deraigns its title as aforesaid. The plaintiff's title originated in a deed from Marks dated June 12, 1913, to one C. N. Sweet, who, with his wife, thereafter, on October 1, 1915, by deed, conveyed the same to one T. A. Ketchum, and said Ketchum, on April 27, 1916, conveyed the sixty-foot strip of ground marked "A" on the plat to the plaintiff. Plaintiff claims no other right or title to said land except as just stated; but upon various grounds disputes and contests the right and title of the P. V. C. Co. The plaintiff concedes that in issuing the patent for said coal lands to Marks the title passed to him. In that connection it, however, also contends that both Williams and Goss were disqualified from acquiring or holding coal lands, for the reason that when Marks deeded to Williams and when Williams deeded to Goss both Williams and Goss had exhausted their rights to acquire and hold coal lands from the government. The plaintiff therefore contends that, in view that both Williams and Goss were, by law, prevented from acquiring coal lands, title did not pass from Marks to Williams and from Williams to Goss, nor from Goss to the P. V. C. Co., and hence said P. V. C. Co. obtained no title by means of the deeds aforesaid. Plaintiff's counsel concede that Marks was paid full consideration for the land by him conveyed to Williams, and that the P. V. C. Co. paid the full purchase price therefor, amounting to \$4,000, and that Marks still retains such consideration.

From what has been said it is clear that plaintiff's attack upon the title to the lands in question is purely collateral, and that the title is not assailed upon the ground that Marks defrauded the United States government, or 2 that he, through fraud or otherwise, prevented any one from contesting his application to enter and to purchase the coal land in question.

The question therefore arises, Can plaintiff's attack upon the title prevail? It would seem that merely to state the facts

should be sufficient to convince any one that if title to government land can successfully be assailed in collateral proceedings and upon the grounds hereinbefore outlined, then titles emanating from the United States government are frail indeed. Upon the questions hereinbefore indicated, counsel for both sides have cited and reviewed an exceedingly large number of cases which they claim are decisive of the respective views advanced by them. We have carefully examined the cases referred to by counsel and we have found none that are directly in point. It is, however, not remarkable that no case precisely in point was or can be found, since the attack upon the title of the P. V. C. Co. at this late date and under the conceded facts and circumstances of this case, to say the least, is somewhat unique. Moreover, the legal questions involved are not complicated, nor are they necessarily difficult or obscure. For the most part the questions are governed by elementary principles. In view that the numerous cases referred to by counsel are at most merely analogous, and if we undertook to refer to one we, in fairness to both sides, would be required, not only to refer to all, but, in addition thereto, would have to review and distinguish a large number of cases, we have concluded that no good purpose could be subserved in reviewing and distinguishing the many cases cited, and hence we shall refrain from citing or reviewing any of the many cases referred to in counsel's briefs. Moreover, in nearly all of the cases referred to, the attack was a direct one upon the patent instituted by the government itself. In all of those cases, however, it is made very clear that although the patent be obtained by fraud, conspiracy, etc., yet the title passes from the government to the grantee, and that a patent thus issued is voidable and not void. In the very nature of things, such must be the law. While counsel for plaintiff concede the doctrine just stated, yet they, for various reasons, insist that the present case is an exception. It is urged that in view that Mr. Marks undertook to convey the land to a disqualified person, and did so before he had made application to purchase the same, and before he paid for it, for that reason he, as a matter of law, could not, and did not, convey anything

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to Williams. In that connection the fact must not be overlooked that in this case the government was not defrauded by Marks, its grantee. That is, Mr. Marks, the grantee, was legally qualified to enter and purchase the coal lands, and he paid the government the full purchase price therefor. Again, his application was contested upon the ground that he had violated the United States laws in entering the land for the benefit of another, and that question was tried out in the tribunals established for that purpose and the contest was found to be without merit. The fact is, therefore, conclusively established, at least as against one claiming title through Marks, and in a collateral attack, that Marks did not violate the law in acquiring title to the land. Nor do we think that in a collateral proceeding the title can be assailed at this late date for reasons other than those stated in the contest. Marks having obtained title to the land then, as directly held in the case of *United States v. Keitel*, 211 U. S. 370-389, 29 Sup. Ct. 123, 53 L. Ed. 230, the law imposed no limitations upon the right of Marks to sell the land to any one. It should also be remembered that no contention is made that either Marks or any one else prevented either Sprunt or any other person from fully contesting Marks' right to purchase the land. No fraud of any kind was practiced on Sprunt, and nothing was done to prevent him from fully presenting all the facts relating to his protest. Such being the case, the findings and decisions of the officers of the Land Office cannot now be assailed in a collateral proceeding by one claiming through or under Marks. The findings and decision in that contest are just as binding upon one claiming through or under Marks as they would be if the findings and decision had been against him.

We are also of the opinion that the contention of counsel, that in view that both Mr. Williams and Mr. Goss were disqualified from acquiring coal lands, for that reason they could neither receive nor transmit title, is not tenable. It is elementary that, whenever a person may be disqualified 3 from holding title for himself, yet he is a proper conduit through whom to pass title from one who has it to one who may legally take it. As before stated, Marks obtained the

title by a United States patent and therefore could convey good title to his grantee. If, therefore, neither Williams nor Goss could acquire the land or hold the title thereto, yet they could receive the title from a person having it and could transfer the same to any one who could lawfully take it. There is no contention, nor could it reasonably be contended, that the P. V. C. Co. merely as a corporate entity was or is disqualified from acquiring or holding title to coal lands. The contention, as before stated, however, is that, for the reasons stated, it was disqualified from acquiring the title to the lands in question. With this contention, however, for the reasons herein stated, we do not agree.

It is further urged that because Marks conveyed the land before he had made application to purchase, and before he had a right to, and had acquired, the title thereto from the government, for that reason he conveyed nothing to Williams, and Williams conveyed nothing to Goss, and 4 the latter conveyed nothing to the P. V. C. Co. Counsel for said company, however, contend that by virtue of Comp. Laws 1907, section 1979, although Marks had not acquired the title when he conveyed the land to Williams, yet, in view that the former thereafter acquired the title, it, nevertheless, passed to his grantee. That section reads:

"If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors, or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance."

Plaintiff's counsel contend that the foregoing section does not apply in this case. Without pausing to discuss that question further, we can perceive of no good reason why the statute does not apply here if it applies in any case, and no claim is made that the statute is not a wholesome and proper one.

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We can conceive no reason, therefore, why the P. V. C. Co. did not obtain, and ever since the issuance and delivery of the deeds we have mentioned has not had, a good and indefeasible paper title to the 160 acres of land in question.

In our opinion the paper title to the 160 acres of land 5 is in the P. V. C. Co. and in no one else. Nor can we, in view of the undisputed facts, understand upon what principle Marks, and those claiming under him by virtue of the deed of 1913, can escape the P. V. C. Co.'s plea of estoppel. Marks has received and retains the full purchase price for the land. He, during all of the years aforesaid, knew that the P. V. C. Co. claimed the title thereto, and under that claim had placed more than a quarter of a million dollars worth of improvements thereon; yet, during all of the time, Marks retained the purchase price and has stood by and permitted the P. V. C. Co. to invest its money without making any claim to the land or any part thereof. Can any one doubt that Marks himself would be estopped from claiming title to the land now? If, therefore, Marks would be estopped, in view that the plaintiff, under the undisputed evidence, cannot claim as an innocent purchaser, and as it claims its title through Marks, the plaintiff, too, is estopped.

The company, however, also claims, and the district court found, that it had acquired title to the land by adverse possession under our statute. In view of what has been said respecting the paper title, it is, however, wholly unnecessary to discuss that phase of the case, and we refrain from doing so.

In view, therefore, that the title is in the P. V. C. Co., the plaintiff must acquire its right to the strip marked "A" on the plat by condemnation.

After the cause had been submitted, and after plaintiff had filed its reply brief, which was filed some time after submission and after the foregoing was written, plaintiff's counsel have specially referred us to the case of *Doepel v. Jones*, 244 U. S. 305, 37 Sup. Ct. 645, 61 L. Ed. 1158, which 6 they seem to think is in their favor. We have carefully considered the facts in that case, and the opinion based thereon, and, in our judgment, the principle which controlled

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the decision fully justified the conclusion we have reached. The decision in that case is based on 5 U. S. Comp. Stat. 1916, Ann., section 5025, which section reads as follows:

"It shall be unlawful for any person, for himself or any company, association, or corporation, to directly or indirectly procure any person to settle upon any lands open to settlement in the territory of Oklahoma, with intent thereafter of acquiring title thereto; and any title thus acquired shall be void; and the parties to such fraudulent settlement shall severally be guilty of a misdemeanor, and shall be punished upon indictment, by imprisonment not exceeding twelve months, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court."

The statute seems to be limited to the territory of Oklahoma, and the case arose in that territory. Mr. Chief Justice White, in the course of the opinion, says:

"It cannot be seriously disputed that if the agreement was made by Fernow, the original applicant, that he would make the homestead entry not for himself, but for the benefit of another, would, during the time that he was apparently taking the steps to complete the entry, pay rent for the land to such other person, and when the patent was issued deed the land to such other person, such agreement caused that entry to be absolutely void for repugnancy to" the statute we have quoted.

We need not review that decision further. It is sufficient to say that the decision is based entirely upon the fact that the person who made the homestead entry did so for the benefit of another, and he agreed that upon obtaining title he would convey the same to such other person. Any title based on the entry in that case would, therefore, of necessity, be void and of no force or effect. If it be assumed, therefore, that that case states the law generally applicable in all of the states of the Union, yet the case has no application to the facts in the case at bar.

As we have before pointed out, however, counsel for plaintiff concede that the patent in the case at bar is valid and that by it the title passed from the United States to Marks. They also concede that Marks, the grantee of the government, obtained the title without committing any fraud or deception on the government, and without violating any statute. The patent on which the title of the P. V. C. Co. is based is, therefore, valid and free from all defects. Moreover, the deed

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from Marks, the grantee in said patent, was also free from fraud and deception. Marks intended to convey the title to the lands in question and obtained full consideration for what he conveyed.

The only claim remaining, therefore, is that the grantee of Marks was disqualified from acquiring title to coal lands. That, however, as we have pointed out before, cannot affect the title of the P. V. C. Co. since the title necessarily passed from Marks to his immediate grantee, Williams, and from Williams to Goss, the immediate grantor of the P. V. C. Co. In the case last referred to the entry and every act based thereon were void and of no effect. Not so here. Marks' entry and the patent based thereon were valid and without any legal flaw whatever. So long as the patent issued to Marks stands, therefore, we cannot see how plaintiff can assail the title of the P. V. C. Co., which claims title through Marks and through whom plaintiff also claims title, but by a subsequent deed. It is certainly an anomaly to say that although Marks intended to convey the lands, was legally qualified to do so, and was in no way deceived or defrauded, and received full consideration therefor, he, nevertheless, retained the title until he conveyed the same in 1915 to Mr. Sweet—that he retained the title notwithstanding section 1979, *supra*, which we have quoted in full. We repeat that no case is cited by counsel sustaining such a claim, and certainly the last case referred to by them, which we have specially reviewed, does not even intimate anything of the kind. After again going over the matter, we are still fully convinced that the conclusions announced are sound and should prevail.

We proceed now to a consideration of plaintiff's contention that the district court erred in not condemning a portion of the right of way of the Railroad Co. for a tippie site. As before stated, the Railroad Co., by an act of Congress passed in 1872 (Act Cong. June 8, 1872, c. 354, 17 Stat. 339), obtained a right of way over the land in question 200 feet in width. Early in the '80's it located its line of railroad on said strip. Plaintiff seeks to condemn a strip approximately 70 feet in width and 1,000 feet in length lying between the

tracks marked No. 3 and No. 4 on the plat. A portion of such strip extends beyond the northerly boundary of the right of way into the P. V. C. Co.'s land. In case, however, that the plaintiff is not permitted to condemn that portion of the proposed tippie site which is on the right of way of the Railroad Co., the portion lying on the P. V. C. Co.'s land is of no importance whatever.

We shall therefore confine this discussion to that portion of the proposed tippie site which is on the Railroad Co.'s right of way. Among other things, the Railroad Co. contends that our statute does not confer the right on the plaintiff to condemn land for a tippie site. 7

While we are of the opinion that our statute gives the right to condemn sufficient ground for a tippie site, yet, in our opinion, neither under our statute, nor under the law generally, can the plaintiff condemn any portion of a right of way used for railroad purposes for a tippie site. 8
Comp. Laws 1907, section 3590, subd. 5, reads:

"All rights of way for any and all purposes mentioned in section 3588, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon; they shall also be subject to a limited use in common with the owners thereof, when necessary; but such uses of crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury."

By referring to the provision just quoted, it will be seen that every right of way, as it is expressed in the statute, is "subject to be connected with, crossed, or intersected by any other right of way." And further: "They [the rights of way] shall also be subject to a limited use in common with the owners thereof, when necessary." The statute then prescribes the manner of use of the "crossings, intersections, and connections." The statute thus limits the interference with rights of way to "crossings, intersections, and connections" by other rights of way. True, it makes a right of way also subject "to

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a limited use in common with the owners thereof," but such use is clearly and manifestly a use for which the original right of way was obtained and is being used, and no other. If the statute were given any other construction, then, as we shall see, all rights of way might be diverted from the original use. There is nothing in the statute conferring the right upon any person, natural or artificial, to condemn a right of way which is devoted to a quasi public use by a common carrier for a purpose other than for a similar purpose, and then only to connect with, to intersect, or to cross over the established right of way. The "structures or improvements" on the right of way are made subject only to be interfered with for the "crossings, intersections, and connections" mentioned in the statute, and for the purpose only of another right of way which is devoted to the business of transportation under the law applicable to common carriers, and for that purpose it may be used to a limited extent in common with the owner thereof. That is, such is the limitation applicable to the facts of this case, regardless of what they may be in some other case under different circumstances. The statute thus comports with common sense as well as with the experience of all men. The plaintiff does not seek merely to intersect, connect with, or to cross the right of way of the Railroad Co., but what it seeks to do is to appropriate a longitudinal strip of the right of way approximately 1,000 feet in length by seventy feet in width for the purpose of erecting permanent structures thereon to be used exclusively in plaintiff's business of screening, grading, handling, and loading coal, which it seeks to place on the market for sale. If such a right may be exercised by one person, it necessarily follows that it may be by other persons similarly situated, and hence a railroad right of way could be devoted to purposes entirely foreign to that for which it was granted to the railroad company. Instead of being devoted to the business of transporting freight and passengers under the laws applicable to a common carrier and thus serving the interests of the public generally, the right of way could be condemned for the use of one person only so long as such person was engaged in what is known as a quasi public

business, such as mining and distributing coal. Moreover, any shipper who is engaged in a quasi public enterprise could also acquire a right to a portion of a railroad right of way to accommodate his business to the detriment of the business for which the right of way was originally obtained. Every railroad company, as a common carrier carrying on the business of transportation, is, by the law, required to devote its right of way to that and to no other purpose. It cannot voluntarily surrender or give away any part of its right of way to be devoted to other purposes, although such other purpose may, in some way, affect and benefit a considerable portion of the public, as is the case in the establishment of grain elevators, etc. If it be once conceded that a coal company may condemn a portion of a right of way for a tippie site to construct tipples which are used for the purpose of screening, grading, handling, and loading coal on cars, then why may not an elevator company likewise condemn a portion of a right of way to construct buildings to be used for the purpose of cleaning, grading, handling, and loading wheat, corn, and other agricultural products? The law imposes a duty upon every railroad company that is engaged in the business of a common carrier to provide reasonably adequate facilities to all shippers to load and unload all kinds of freight, including coal, live stock, and grain. To obtain such facilities it is not necessary for any shipper, dealer, or manufacturer to condemn any portion of the right of way. If, therefore, it be necessary for the coal company to screen and grade its coal before it can be marketed, the company must provide not only the structures, machinery, and appliances necessary for that purpose at its own expense, but it must also obtain the ground upon which the structures are erected and the appliances used outside of the right of way of the railroad's right of way which is already devoted to purposes which can only be subjected, as the statute expresses it, for connections, crossings, and intersections of other rights of way. If any part of the railroad right of way, either with or without the consent of the railroad company, could be used for permanent structures, such as coal tipples, elevators, mills, etc., then it might well

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be that these things not only might directly interfere with the business of transportation carried on by the railroad owning the right of way, but they might also interfere with that business by preventing the necessary intersections, crossings, or connections of other railroads to be made, and thus the purpose of the statute would be nullified.

Nor does it affect the question that, by reason of lack of proper ground space, tipple sites are not readily obtainable by the plaintiff. As pointed out, whenever a railroad company enters into the business of a common carrier it must provide reasonable means of access to its lines, tracks, and cars, not only to one shipper and for one kind of freight, but for all shippers and for all kinds of freight. If it becomes necessary to construct more extensive spurs and side tracks in order to accommodate the shippers and to facilitate transportation, the spurs and the side tracks must be built. One shipper, whatever his supposed needs may be, may, however, not condemn a part of a right of way for his own needs and thus hamper the railroad company in discharging its duties to all other shippers.

Without pausing to discuss the question further, we are clearly of the opinion that the plaintiff may not condemn any portion of the right of way for a tipple site, regardless of whether the location desired by it for that purpose on the right of way of the Railroad Co. would be most convenient, and would indirectly benefit the public by permitting the plaintiff to ship coal at a cost less than it otherwise can.

In this connection counsel for both sides have again cited a large number of authorities to which, in our judgment, it is not necessary to refer.

In what we have said respecting the right to condemn a portion of the railroad right of way, we do not mean to be understood as laying down any hard and fast rule respecting that matter. All that it is necessary to decide, and all that we do now decide, is that a right of way, based upon a grant by Congress, which is devoted to the business of transportation by a common carrier, cannot, either with or without the consent of such carrier, be devoted to

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permanent structures such as the plaintiff desires to erect on the right of way belonging to the Railroad Co. Nor do we desire to be understood as laying down a rule regarding the duties of common carriers and the rights of the shipper, except in general terms, as before indicated. In case a shipper requires greater facilities, whether it be more cars, or more tracks, he may apply to the proper commissions created by law, who will hear his case. In case those commissions fail to grant the desired relief, the courts are always open and accessible to review the acts of those commissions on questions of law.

Nor is there anything contrary to the principles herein announced in the case of *Postal Tel. & Cable Co. v. O. S. L. R.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705. In that case a portion of the right of way was permitted to be condemned for another right of way. The right of way sought to be condemned was intended to be devoted to the business of a common carrier. It is well settled that the business of a telegraph company is that of a common carrier. Moreover, the space or area of the right of way condemned in that case was insignificant and could in no way interfere with or impede the business of the railroad company.

The district court, therefore, committed no error in denying plaintiff the right to condemn any portion of the right of way owned by the Railroad Co.

While plaintiff has also assigned error respecting the court's ruling and order that the sixty-foot strip of ground which the court ordered condemned should not extend farther than within five feet of the outer rail of track No. 4, yet comparatively little space is devoted to that proposition 10 in plaintiff's brief. Counsel, however, insist that the court's order in that regard constitutes error. Upon that question the evidence was that the plaintiff had constructed a "coal bin" near track No. 4 from which it loaded coal onto the cars of the railroad company, and that the bin was built so near to the track that it was a menace and a danger to the men who were employed to operate and switch the cars on track No. 4. The evidence also showed that a clearance space

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of five feet between the outer rail and any structure built near the track was necessary to safely operate trains and switch cars over the track. It was also shown that while track No. 4 departs from the original right of way at the point where the sixty-foot strip joins the original railroad right of way as indicated on the plat, yet that track No. 4 always was, and is being, used as though it were on the original right of way. In that regard the court specially found:

“And the court further finds that said track 4, mentioned in the pleadings and evidence herein, at the time of the commencement of this action, was, and long prior thereto had been, and now is, dedicated, appropriated, and devoted to a public use, together with a clearance space or strip of not less than five feet parallel to and from the outer edge of the north or northerly rail of said track 4.”

So far, therefore, as shippers are concerned, track No. 4, including the five-foot strip, must be regarded and treated as though it were actually located on the original right of way.

As we have hereinbefore pointed out, shippers are not required to condemn rights of way extending them onto railroad grounds. Nor are they required to approach nearer to the tracks than is necessary to load and unload their freight. It is apparent to any one that, in order to avoid danger to the railroad employees in operating trains and in switching cars, there must of necessity be a clearance space extending some distance beyond the outer rail of every railroad track. The court found that five feet clearance was necessary. It would seem that that space is a most reasonable one since the cars extend about two and one-half to three feet beyond the rail, and in addition to that there must be sufficient room for a man to pass between the cars and any structure that may be erected along the track. That room is also necessary for the safety of the railroad brakemen who may be required to stand on the ladders attached to the cars. Indeed, the necessity for such a space is so apparent and so general that a court could well take judicial notice of its necessity and extent. In view that every shipper must be given the right and afforded the opportunity to load his freight and the opportunity to unload the same

from the cars of a common carrier, and the carrier must provide sufficient room or space for that purpose, no shipper can be required to condemn any grounds except for the purpose of erecting permanent structures thereon to store his freight or to prepare it for shipment. In erecting such structures he may, however, not encroach upon the right of way of the common carrier, nor may he place structures so near the track as to make them a menace and a danger to the operatives of the railroad. There is absolutely no necessity, therefore, for the plaintiff to condemn any ground except for permanent structures. Under the judgment and order of the court it may erect structures extending the full width of the sixty-foot strip condemned, and it may erect them within five feet of the outer rail of track No. 4, which the court found has always been and is being used for railroad purposes. The plaintiff is permitted to reach the railroad track at any point on the sixty-foot strip, and there is no room for the contention that it would have to become a trespasser to reach the railroad track. No one, not even the owner of the ground, could now prevent the Railroad Co. from using track No. 4 the same as all other tracks, and hence could not interfere with any shipper. For aught that appears, however, in the record, the Railroad Co. has a perfect right to use and maintain track No. 4 the same as any other track. If, however, it lacked title, the owner thereof, the P. V. C. Co., under the evidence and finding of the court could not now interfere with the use and maintenance of track No. 4, but the most that that company would be entitled to would be to recover from the Railroad Co. the value of the ground occupied by track No. 4. What the rights as between the Railroad Co. and the P. V. C. Co. may be, however, does not in the least concern the plaintiff, since, as we have seen, it may construct any permanent building to within a proper distance of the railroad track, and may thus have use of the railroad precisely the same as though it were permitted to condemn to the outer rail of the track. Indeed, if it were permitted to condemn ground nearer to the track, it would be permitted to do that without any benefit to it or to any one, since it would not be permitted to so use its ground

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as to make it a menace and a danger to the railroad employees as before stated. The plaintiff would, therefore, merely be required to condemn and pay for what it could not use. Nor will the Railroad Co. under the law, be permitted to hereafter move its track so as to inconvenience the plaintiff.

We have perhaps devoted more space to this assignment than was necessary, but we did so in order to make clear the want of merit to the contention that the district court deprived the plaintiff of any rights, and that neither the Railroad Co. nor the P. V. C. Co. in any way can reap an advantage from the ruling and order of the court.

As before stated, all that we are called on to decide, and all that we do decide, is that the law does not authorize the plaintiff to condemn any portion of the right of way for a tipple site; and although the track may depart from the original right of way, yet the track, being used in legitimate traffic, cannot be devoted by the plaintiff to its exclusive right.

It is further contended by plaintiff that the court erred in admitting and in excluding evidence during the progress of the trial. In view of the foregoing conclusions, however, none of those assignments could affect the result, and it is therefore unnecessary for us to discuss any of them.

The defendant P. V. C. Co. has, however, assigned cross-errors, and now insists that the district court erred in condemning the sixty-foot strip down to within five feet of the outer rail of track No. 4. It is contended in that regard that the tramway that is to be used on the strip is to be constructed and operated on an incline of twenty-five per cent.; that the operation of the tramway on such an incline is dangerous, and that the plaintiffs at a cost which is great, but not prohibitive, could obtain tipple grounds and could transport its coal from its mine to the railroad tracks in a safer manner at least at two other points. The court has found the facts against the contention of the P. V. C. Co. in that regard, and there is no contention that there is not sufficient evidence to sustain the court's findings. Indeed, there is ample evidence to sustain the findings of the court, not only in that particular but in all other particulars.

From what has been said, it follows that the contentions of neither party should prevail, and therefore the judgment of the district court should be, and it accordingly is, affirmed at appellant's costs.

McCARTY, CORFMAN, and THURMAN, JJ., concur.

GIDEON, J.

I concur in the result affirming the judgment of the district court, but in doing so I desire to say that, while I agree with the conclusions of the Chief Justice that the P. V. C. Co., merely as a corporate body, is and was authorized to take and hold title to coal land, yet I am unable to agree that such coal company was qualified to take title to the particular lands in question at the dates of the conveyances to it. From the undisputed facts that one of the original incorporators of the coal company (Wood), and that both Williams and Goss (Goss being a stockholder on the date of the conveyance to him) had exercised their right to select and file upon lands belonging to the government as coal lands, and each had subsequently acquired title to 160 acres of such lands, I am unable to arrive at any other conclusion, under R. S. U. S. 1875, section 2350 (U. S. Comp. St. 1916, section 4662), than that not only Williams and Goss, but the coal company as well, were not qualified entrymen at the date of the Marks patent, or at the date the conveyance was made to either of them. I do not think, however, that the appellant should be adjudged to own the land sought to be condemned or to question the title of the coal company thereto. I base that conclusion on what appears to me from the record to be an undisputed fact, that—whether or not Marks at the date of his original entry, made the same in good faith to acquire the land for himself—from the subsequent acts of all the parties and the dates of the conveyances but one conclusion can be drawn, and that is that he, Marks, the original entryman, Williams and Goss, intermediary grantors, and the P. V. C. Co. were all parties to the agreement or understanding that Marks should acquire title to these lands for the benefit of the coal company and not for himself.

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As they all participated in the conspiracy, and the entryman Marks received and retained the consideration to which his agreement entitled him, plaintiff should not now be permitted to make any claim based upon his part in that conspiracy. In other words, this court should not assist the plaintiff, as the grantee of Marks, but should leave the parties just where they have placed themselves. In my judgment the decree refusing to adjudicate plaintiff to be the owner of the premises should be based upon that reason, and not upon the ground that the coal company was legally entitled or authorized to receive and hold the title to the premises in question.

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No. 3002. Decided September 29, 1917. (168 Pac. 105.)

1. **WITNESSES—REFRESHING RECOLLECTION—DISCRETION.** Whether a written memorandum may be referred to by a witness, for the purpose of reviving a present recollection, or as a record of a past recollection, is a matter largely within the discretion of the trial court. (Page 427.)
2. **WITNESSES—REFRESHING RECOLLECTION.** An instrument in writing becomes a record of a past recollection merely, when it fails to revive a present recollection of the facts to which it relates, and in such case the witness must be able to state positively that he knows it was made at a certain time, and that when made it was true. (Page 427.)
3. **WITNESSES—REFRESHING RECOLLECTION—DISCRETION.** The court did not abuse its discretion in permitting plaintiff, a farmer, while testifying as to the acreage and various kinds of crops grown on certain land for certain years, to refresh his present recollection by reference to a memorandum made by him, three years after the crop was grown, in part from his recollection and in part from accounts kept in a diary during the years the crops were grown, where the witness testified to a large majority of the items without referring to the instrument and stated that he believed he could testify to all, if given sufficient time, making it apparent that the instrument was of the kind used for reviving a present recollection rather than a record of a past recollection which must have been made at or about the time of the event to which it relates. (Page 431.)
4. **NUISANCE—POISONOUS GAS—INJURY TO ANIMALS—EVIDENCE—SUFFICIENCY.** In an action for damages to live stock and crops

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alleged to have been caused by the operation by defendant of a smelter emitting poisonous gases, evidence *held* insufficient to show that the death or sickness of the animals was caused by the alleged operation.¹ (Page 433.)

5. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—DAMAGES. The court erred in refusing to withdraw from the jury consideration of damages on account of squash and truck garden damaged or destroyed, where there was no evidence of the cost of harvesting the same. (Page 434.)
6. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—DAMAGES. Where the net damage to the grapevines for the years alleged in plaintiff's complaint could not be ascertained from the evidence, the court erred in not withdrawing from the jury consideration of damages to the same. (Page 435.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by W. W. Sagers and another against the International Smelting Company and others.

Judgment for plaintiffs. Defendant named appeals.

MODIFIED and AFFIRMED CONDITIONALLY, without costs.

Van Cott, Allison & Riter for appellant.

E. A. Walton and Hancock & Barnes for respondents.

THURMAN, J.

This is an action to recover damages for injury to certain crops, live stock, and wire fences in Tooele County, during the years 1911 to 1915 inclusive. The injury is alleged to have been caused by the operation of defendant's smelter in the vicinity of plaintiffs' land, whereby smoke, fumes, and poisonous gases arising from the smelting of copper, iron, zinc, silver, arsenic, antimony, and other mineral ores were discharged into the air and carried out over and upon the plaintiffs' land, causing the injury complained of.

¹ *Edd v. Union Pac. Coal Co.*, 25 Utah, 293, 71 Pac. 215; *Edgar v. Rio Grande Western Ry. Co.*, 32 Utah, 330, 90 Pac. 745, 11 L. B. A. (NB) 738, 125 Am. St. Rep. 867.

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The case was tried to a jury. Verdict was rendered for plaintiffs and judgment entered. The defendant Smelting Company appeals and assigns as error that certain evidence was inadmissible, and that the evidence in other respects was insufficient to justify the verdict.

Plaintiff's crops were distributed over several parcels of land in township 3 south, of range 4 west of the Salt Lake Meridian. In presenting their evidence, plaintiffs sought to have their witnesses describe the acreage and kind of crops grown on each parcel of land, during each of the years in question consecutively, commencing with section 11, for the year 1911. During the examination of W. W. Sagers, one of the plaintiffs, as a witness, he testified from recollection to the various kinds of crops grown on section 11 for the year 1911 and the acreage of each crop. Before fully concluding his testimony on that point, however, he was asked by his counsel if he had kept a memorandum of the crops planted during that year. Replying in the affirmative, he was requested to refer to it and give the acreage. He stated that he had made the memorandum himself and knew it was correct. In cross-examination as to its competency to refresh his recollection, it developed that it was made within a year and a half next preceding the date of the trial and about three years after the crops were grown. Defendant objected to the witness referring to the instrument on the grounds that it was incompetent, irrelevant, and immaterial, and not proper to be used by the witness to refresh his recollection. On further examination of the witness as to the competency of the instrument the fact was elicited that the data for the memorandum were taken in part from the recollection of the witness and in part from accounts he had kept in a diary during the year the crops were grown. Defendant at this point interposed the further objection that the memorandum sought to be used was only a copy of accounts contained in another book. All of the objections were overruled. The witness, referring to the instrument, proceeded to detail the acreage and kind of crops grown on the parcel of land in question for the year 1911. His evidence was substantially the same as that given by him before refer-

ring to the memorandum. Just why the memorandum was called for and injected into the case by plaintiffs' counsel at that stage of the proceeding is not disclosed by the record. During the cross-examination of the witness as to the competency of the memorandum, he several times stated that he could give the items without referring to it if he was given time. The witness was permitted, over objections by defendant, to refer to the writing while testifying as to the acreage and crops on the same parcel of land during 1912; and while the record is not clear, it is fair to presume he used it also in connection with his testimony concerning crops on the same parcel of land in 1913 and 1914. As to crops in 1915, the record affirmatively shows the witness testified entirely from recollection. The same is also true of the years mentioned as to crops raised on section 14, the crops and acreage being about the same every year. As to the crops raised on section 13, witness was asked to state them without using the memorandum, and did consecutively for every year during the whole period of time. He did the same as to the remaining parcels of land upon which crops were grown. As to the wire fences alleged to have been injured and the horses and cattle that had died, the witness testified from recollection both as to numbers and value. At a later stage of the trial the same witness was asked in detail as to the acreage, kind, and quantity of crops raised on all the several parcels of land during each and every year from 1911 to 1915 inclusive. He answered the questions from memory and from memoranda made at the time the crops were harvested without objection, except as to the quantity of corn raised, in which case he was permitted to refer to the memorandum which had been objected to theretofore. It is proper to state once for all that this memorandum was seasonably objected to by defendant whenever it was referred to during the trial. The witness also testified from recollection as to the values of the various crops and the difference in quantities raised before and after the smelter went into operation. Later in the trial he testified fully from recollection as to the quantity of corn raised in each and every year. The crops to which the testimony related

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were wheat, oats, lucerne, corn, potatoes, squash, garden truck, and fruit. The witness had been one of the owners of these lands for a great many years, during which time he had annually raised the same kinds of crops as those concerning which he testified at the trial.

We have endeavored, without undue prolixity, to give sufficient of the details connected with the use of the memorandum in question to show the circumstances and conditions under which the witness was permitted to refer to it while giving his testimony.

Whether or not written memoranda may be referred to by a witness for the purpose of reviving a present recollection or as a record of a past recollection is a matter largely in the discretion of the trial court; and that discretion will of necessity be governed and controlled by the nature 1 and circumstances of each particular case in a large degree, rather than by attempting to apply a fixed and definite rule to all cases that may arise. In the present case respondents and appellant radically differ as to which class the memorandum in question belongs—whether it is to be treated as a record of a past recollection or an instrument that may be referred to to revive a present recollection. There is a marked line of distinction between the two, well defined and recognized, especially by modern authorities. Appellant contends that the memorandum in this case is a record of a past recollection merely, while respondents contend it belongs to the other class. The distinction given by the authorities and the difference of opinion between the opposing parties become of vital importance in determining the issues raised by this assignment of error.

The rules applicable to the two classes of memoranda will determine the class to which the one in this case belongs. As we understand the authorities an instrument in writing becomes a record of a past recollection merely, when it fails to revive a present recollection of the facts to 2 which it relates; but in such a case the witness must be able to state positively that he knows it was made at a certain time and also knows that when made it was true. It must also

appear that the memorandum was made at or about the time of the event to which it relates. If satisfactory proof is made of these essential conditions, the instrument itself is admissible as evidence of the facts to which it relates.

The development of the law relating to this class of memoranda and the conditions under which it may be used as evidence is given by Professor Wigmore, in his work on Evidence, vol. 1, pp. 826 to 848, inclusive. The same author at pages 849 to 859, inclusive, states his view of the law relating to the other class of memoranda, namely, written instruments to revive present recollection. If the instrument in fact revives the present recollection of the witness so that he remembers the facts or transactions to which it relates, he is permitted to use it for that purpose only. He then testifies from his recollection thus stimulated and revived, the instrument itself not being admissible in evidence. The same author, referring to this class of memoranda, at page 852, says:

“That the paper is a copy, not an original, is also no essential fault. The only question is whether in fact, it is genuinely calculated to revive the witness’ recollection and for this purpose a copy may conceivably be entirely satisfactory. The radical difference of principle between this use and that of a copied record of past recollection is plain; there is here no necessity of accounting for the original in any way.”

At this point the author quotes excerpts from three decisions which we consider of sufficient importance, as illustrating his view, to incorporate into this opinion:

“1843, Shields, J., in *Dunlop v. Berry*, 5 Ill. (4 Scam.) 327, 39 Am. Dec. 413 (the witness refreshed his memory as to the contents of a return by looking at the copy of it in the declaration): ‘It was competent for him to use the declaration or any other paper for the purpose of refreshing his memory on the subject.’”

“1852, Jewett, J., in *Huff v. Bennett*, 6 N. Y. 337 (the witness used a newspaper report): ‘It is well settled that he is permitted to assist his memory by the use of any written instrument; and it is not necessary that such writing should have been made by himself, or that it should be an original writing, providing after inspecting it he can speak to the facts from his own recollection.’”

“1877, Cole, J., in *Folsom v. Log-Driving Co.*, 41 Wis. 602 (the witness, testifying to the amount of damage, used a copy made

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recently by K. from a copy of original contemporary memoranda, the other papers having become defaced): 'This kind of evidence is open to more or less suspicion, because * * * it may lead him to suppose he recalls facts when he really does not. But this affects the credibility rather than the competency of the testimony.' "

After quoting the foregoing excerpts the author says:

"That the paper was not drawn up about the time of the events is not an essential fault. The recollection may be equally refreshed by a recent note, as by some contemporaneous record. It might, in fact, be argued that there was less danger of reliance upon the record itself and more probability of actual refreshment, where the paper was one confessedly having no value as a contemporaneous record of past recollection."

In Elliott on Evidence, vol. 2, at sections 854-872, inclusive, this question is quite thoroughly considered. At section 859, the author classifies the different kinds of memoranda generally about the same as does Wigmore, except that he adds a third class which he admits is questionable, and which, in any event, we consider immaterial in the present case. At section 861 he discusses the question as to the time when the memorandum should be made and arrives at the conclusion that no definite rule can be laid down. That section and the next following read as follows:

"No definite rule can be laid down as to when the memorandum should be written or as to how nearly contemporaneous with the fact or facts recorded the memorandum must be, for a memorandum written at one time might aid the memory of one but be no aid to another. In other words, a memorandum made long after the fact may be to some witnesses of much greater use than even a contemporaneous memorandum will be to others. It follows that very much must depend upon the circumstances of each case, the character of the witness, and the court's discretion, and consequently it should not be stated as a general rule that a memorandum should not be used for refreshing the present recollection unless made contemporaneously with the fact which it records, although as to past recollection it should ordinarily appear that the memorandum was made at or about that time.

"The rule, as found in the decided cases, is that the memorandum may and should have been prepared at the time of the fact therein recorded, or soon thereafter, while the facts are still fresh in the memory of the witness. This rule, however, while often stated, and sometimes applied indiscriminately, should, it is submitted, be strictly applied only in reference to past recollection, and not where the witness has an independent present recollection after his memory is refreshed."

In section 863 the author states what he calls the better rule that the document need not be contemporaneous with the event or fact referred to, and that it may be of almost any character. This refers to memoranda used to stimulate the memory and not as the record of a past recollection. At section 870, he states that by the great weight of authority it is no objection that a copy of an original memorandum is used for the purpose of refreshing the memory, if it does, in fact, serve to revive the recollection so that the witness has a perfect memory of the facts. At section 872, he confirms the rule already stated that where the memorandum refreshes the recollection so that the witness can testify to the facts the document itself is not admissible as independent evidence, but where it does not refresh the memory but the witness can say he knows the memorandum was true when made, although he has no present recollection of the facts to which it relates, the document itself is admissible.

Greenleaf on Evidence, vol. 1 (16th Ed.) sections 439a to 439b, briefly and intelligently discusses the question of a memorandum as the record of a past recollection, while, at section 439c, he explains and elucidates his view of the law as to memoranda used for the purpose of reviving a present recollection. Without quoting the language of the author it will be found upon examination of the sections referred to that he practically is in accord with the authors to whom we have referred at greater length.

Jones, in his Commentaries on Evidence, vol. 5, at sections 874 to 880, inclusive, treats of memoranda to refresh or revive present recollection, and, at sections 881 and 882, states the law as he understands it relating to memoranda as a record of a past recollection. He also is in harmony with the other text-writers to whom we have referred. These authorities generally agree upon the conditions and circumstances which differentiate one class of memoranda from another, and the conditions and circumstances under which each class or kind may be used. See, also, Cyc., vol. 40, at pages 2452-2467, inclusive. See especially the last page referred to, paragraph X, which reads as follows:

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“A memorandum or other writing is not made evidence by being used to refresh the memory of a witness, or by the fact that it would be permissible to use it for such purpose and if the witness, after examining the writing, testifies from his own independent recollection of the facts, the writing cannot be introduced in evidence or read to the jury. Where, however, a witness has no independent recollection, but testified merely from his knowledge or belief in the accuracy of the paper, it is proper that such paper should be put in evidence or read to the jury as auxiliary to the witness' testimony or as a statement adopted by him.”

As far as we have been able to inform ourselves, all of the modern authorities on evidence are substantially to the same effect. They agree upon the classes of memoranda that may be used by a witness and the circumstances and conditions under which they may be used. Most of the cases cited by the authors referred to generally support the text. We have not cited them specially and in detail as it would serve no useful purpose, after having made the references we have in the preceding pages. By reference to Phillips on Evidence, an English work, vol. 1, at page 289, and Taylor on Evidence, a still later English work, vol. 2, at sections 1406 to 1413, inclusive, it will be observed that considerable progress has been made in the development of this class of evidence since the works of those authors were published. Phillips makes no division of memoranda into classes whatever while Taylor, a later authority, makes the distinction from which the classes are more clearly defined by the American authorities. This distinction is very concisely stated in section 1412, above referred to.

From these authorities, and others that might be cited, we have no difficulty in this case in arriving at the conclusion that the document here in question is one referred to for the purpose of reviving a present recollection rather than as a record of a past recollection. We are led to this 3 conclusion mainly because, as already shown, the witness was able to testify and did testify to a large majority of the items required by the questions propounded to him without referring to the instrument, and also because he stated several times during his examination, in relation to the instrument, that he believed he could testify to all of the items from recollection if given time. He was not given time, and there-

fore whether he could have so testified without the memorandum was not actually demonstrated at the trial. He testified to enough, however, without referring to the document to justify the belief that with some assistance from the memorandum he could testify to the facts from present recollection. It should be remembered in this connection that the witness was not a merchant, or a shopkeeper, or other person with an infinite variety of daily transactions impossible for any one not a prodigy to remember except just long enough to make a record. But he was a farmer living on and cultivating the farm he had cultivated for years before; raising the same kinds of crops, varying as to acreage a little from one year to another, but with his land always in view, and perhaps little or nothing to engross his attention except the production and harvesting of the crops thus produced. It does not seem marvelous, when we view it in the light of these circumstances, that such a person should remember to a practical degree of accuracy how many acres of each kind of crops he raised the last year, and the year before, and the year before that, and the quantity and value of the crops raised thereon. No doubt such a farmer is frequently making mental comparisons as time goes on as to whether he is cultivating more or less in any particular year than he did the year before, or in years previous, or whether it amounts to more or less in quantity or value. If we are right in these deductions, how can we say, as matter of law, that a record made by a farmer two or three years after a crop was raised by him is so unworthy of credence as to be insufficient to revive a present recollection? The greatest mistake made by respondents, in our opinion, in respect to this matter, was in practically forcing the memorandum upon the witness at a time when he did not appear to seriously need it to refresh his recollection. But this, even if relied on, would not be reversible error. Cyc., vol. 40, p. 2449.

We have seen, from the authorities cited, that the fact that this instrument was a copy and made long after the event did not render it objectionable if it, in fact, revived the recollection of the witness. As to whether it did or not, or whether

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it was calculated to do it, under all the circumstances, was a matter to be determined, and was determined, by the trial court. That the trial court in such cases is clothed with discretionary power is determined by nearly all the authorities to which we have referred in this opinion, and others as well. *Cyc.*, vol. 40, p. 2449; *Lawson v. Glass*, 6 Colo. 134; *Chamberlain v. Ossipee*, 60 N. H. 212; *Brown v. Smith*, 24 S. D. 231, 123 N. W. 689; *Madigan v. Degraff*, 17 Minn. 52 (Gil. 34); *Johnson v. Coles*, 21 Minn. 108; *Greenleaf, Ev.*, vol. 1, section 439b; *Elliott, Ev.*, vol. 2, section 876; *Jones, Comm. Ev.*, vol. 5, section 879.

Under the circumstances of this case, as disclosed by the record, we are unable to say the trial court abused its discretion in permitting the witness to refer to the memorandum in question for the purpose of refreshing his recollection. This assignment must, therefore, be denied.

Appellant also assigns as error the court's refusal to strike from the record all the evidence relating to the sickness and death of the animals mentioned in the complaint, 4 on the grounds that there was no evidence tending to show that such sickness or death was caused by the defendant.

The testimony of the plaintiff W. W. Sagers tended to show that, after the smelter went into operation, he lost by death the following animals: In 1912, one cow, valued at \$60; in 1913, one cow, \$60; one calf, \$20; and one horse, \$100; in 1914, one cow, \$60; and in 1915, one horse, \$50, making a total of \$350. The witness testified to the various symptoms during the progress of the sickness or disease which finally resulted in the death of the animals. He proved the same symptoms and external appearance by other witnesses for the plaintiff, but none of them knew or could do more than conjecture that the sickness or death of the animals was caused by the operation of the smelter. Besides this there was testimony in the case that during the same period of time there was prevalent in the vicinity a disease among animals, especially among horses, designated by one of the experts as an infectious pneumonia not due to mineral poisoning. This

disease had many symptoms similar to those testified to by plaintiff's witnesses. Again, it appears from the evidence of the expert introduced by the plaintiff that there is an infallible test which can be applied to determine whether or not an animal has died from mineral poisoning, and that is a chemical analysis of certain organs of the animal. It also appears that such test was made; that the organs were chemically analyzed in the manner suggested by plaintiffs' expert on at least two of the animals that had died, and no mineral poison was discovered.

Without entering into detail as to the symptoms of the disease and the theories and conjectures of the witnesses, both expert and laymen, it is sufficient to say we have arrived at the conclusion that the evidence upon the point in question is insufficient upon which to base a judgment, and especially in view of the fact, as we view the evidence, that it is just as probable that the animals died from the other disease referred to as it is that they died from poison resulting from the operation of the smelter. On this point many of the authorities cited by appellant are pertinent and in accord with doctrine almost universal. *Ewing v. Goode* (C. C.) 78 Fed. 442; *United States v. American Surety Co.* (C. C.) 161 Fed. 149; *Edd v. Union Pacific Coal Co.*, 25 Utah, 293, 71 Pac. 215; *O'Connor v. Chicago, R. I. & P. Ry. Co.*, 129 Iowa, 636, 106 N. W. 161; *Fuller v. Ann Arbor R. Co.*, 141 Mich. 66, 104 N. W. 414; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Edgar v. Rio Grande Western Ry. Co.*, 32 Utah, 330, 90 Pac. 745, 11 L. R. A. (N. S.) 738, 125 Am. St. Rep. 867. In fact, the evidence would seem to preponderate against the probability of death by mineral poisoning, when we add to this circumstance the fact that no mineral poison was discovered in the chemical analysis above referred to. In view of this conclusion this assignment of error must be sustained, and the amount of the damages, \$350, be eliminated from the judgment before it can be permitted to stand.

In its fifth and sixth assignments of error appellant contends the court erred in refusing to withdraw from the jury, as requested by defendant, consideration of dam-

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ages on account of squash and truck garden damaged or destroyed, as there was no evidence of the cost of harvesting the same.

The court specifically instructed the jury that it must make deduction for the expense plaintiff would necessarily incur in placing the crop in condition to realize its market value. The court having so instructed the jury, which was proper, whether or not it should have given the request presented by appellant depends entirely on the question as to whether or not there was any evidence of the cost of harvesting. We have been unable to find any such evidence and, therefore, this assignment must also be sustained, and the value of the squash and truck garden eliminated in order to sustain a judgment for the plaintiffs. The damages for squash are claimed only for the years 1911 and 1912; for 1911, \$144; for 1912, \$48; total, \$192. The evidence shows there was an entire failure of the crop, and the crop, but for such failure, would have been worth the sum above mentioned. The evidence shows the truck garden was grown during the years 1911 to 1914, inclusive; that but for the failure it would have been worth \$100 a year, but as conditions were plaintiff only received one-fourth of a crop. The damage, therefore, was \$75 a year, or a total of \$300. This amount together with the total damages to squash, \$192, or a total of \$492, is the total credit that should be allowed on the judgment on account of damage to truck garden and squash.

Finally, appellant contends under its seventh assignment of error that the court erred in not instructing the jury as requested by it, withdrawing from the jury consideration of damages to plaintiffs' grapevines during the 6 years 1912, 1913, and 1914, because the only allegations in the complaint relative to grapevines in those years allege destruction, and appellant alleges there is no evidence to support the allegation.

The evidence tends to show considerable injury to the grapevines during the years mentioned. Some were destroyed entirely, and some were still living at the time of the trial, but, like the net damage to the squash and garden truck,

already considered, the actual damage is unascertainable from the evidence. It is impossible to segregate it, so that the entire damage claimed for the three years must be eliminated in order to sustain a judgment for the plaintiffs. The damages on this account amount to \$100 a year, or a total of \$300.

Appellant's seventh assignment of error is, therefore, sustained. The evidence clearly shows that these crops—squash, garden truck, and grapevines—were greatly damaged, and if it was done by the wrongful acts or omissions of the defendant, as found by the jury, it is an apparent hardship on the plaintiffs to impose upon them a condition that these credits be allowed before the judgment can be affirmed. The plaintiffs are only entitled to the amount of damage they have actually sustained, and the burden was upon them to establish that amount. This damage cannot be determined by merely showing what the value of a full crop would have been when placed upon the market without going farther and showing what the cost of harvesting would have been. This the plaintiffs did not show, and by their failure to do so the entire judgment is jeopardized, unless it can be modified by making the deductions above suggested. These amounts are clearly ascertainable from the uncontradicted evidence in the case.

Appellant contends that in the case of the live stock the damages are not severable from the damage to the hay and pasture, but, as there is no assignment of error as to these items, this contention cannot prevail. Besides this, it is not at all clear to the court that great damage might not be done to hay and pasture, rendering it unpalatable and unfit for feed, and at the same time not destructive of life by mineral poisoning. As to this, however, it is not necessary to express an opinion. This disposes of all the assignments relied on in the argument.

It is therefore ordered that respondents have thirty days from the date of receiving notice of this opinion within which to elect whether or not they will allow a credit upon the judgment of the aggregate amount of the sums herein named, to wit, the sum of \$1,142. If plaintiffs consent that the credits be allowed, the judgment will be modified accordingly and

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affirmed, without costs; otherwise it will be reversed, with costs taxed against respondents.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

ALDER v. CROSIER et al.

No. 3024. Decided October 1, 1917. (168 Pac. 83.)

1. CORPORATIONS—DIRECTORS OF CORPORATIONS—FRAUD—STATEMENTS AS TO SOLVENCY. A complaint against the directors of a corporation, personally for deceit in representing financial condition of corporation when they appointed plaintiff an agent, alleging that representations were made, to influence plaintiff's conduct, were relied on and were untrue, and the resulting damage, states a cause of action. (Page 440.)
2. CORPORATIONS—DIRECTORS—FRAUD—DAMAGES—PLEADING. In an action for deceit in hiring plaintiff by a corporation which soon went out of business, part of a complaint alleging damages by reason of loss of profits that plaintiff would otherwise have made detracts nothing from plaintiff's right to recover for loss of time induced by false representations. (Page 440.)
3. CORPORATIONS—STATEMENTS OF OFFICERS OF CORPORATION—HIRING AGENTS—FRAUD—EVIDENCE. In an action for deceit, evidence held to sustain a finding that a president of an insolvent corporation was guilty of deceit in hiring an agent rendering him liable personally to the agent for damages for loss of time. (Page 440.)
4. CORPORATIONS—DECEIT BY DIRECTORS OF INSOLVENT CORPORATION—HIRING AGENT—EVIDENCE. That the president, a director, of a corporation in hiring an agent misrepresented the corporation by reference to literature, did not render other directors of the corporation personally liable for deceit to such agent, in the absence of evidence that they knew of the literature, or had anything to do with its issuance. (Page 441.)
5. DAMAGES—SPECULATIVE OR PROBLEMATIC—CERTAINTY. Income of an agent dependent upon his ability to induce people to buy land contracts is too problematical and speculative to be a basis of damages for wrongful termination of the agency. (Page 442.)
6. APPEAL AND ERROR—ABANDONED ALLEGATIONS. Where no evidence is introduced to support an allegation in a complaint of damages too speculative to be a basis of action, and no finding is made thereon, there is nothing to review. (Page 442.)

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7. **FRAUD—CONTRACTS OF HIRING—MEASURE OF DAMAGES.** Where one is deceived into a contract on a commission basis, the damages for the deceit are not measured by the contract, but by reasonable value of his services. (Page 442.)
8. **APPEAL AND ERROR—HARMLESS ERROR—AMOUNT OF DAMAGES.** Where the amount of damages assessed in an action for fraud is less than that testified to by any one, there is no prejudice to losing party. (Page 443.)

Appeal from District Court, Third District; *Hon M. L. Ritchie*, Judge.

Action by G. Alfred Alder against A. J. Crosier, Maggie Crosier, Carl Forshee, J. H. Nelson, and Alice O. Nelson.

Judgment for plaintiff. Defendants appeal.

AFFIRMED in part and **REVERSED** in part.

M. E. Wilson for appellant.

A. A. Duncan for respondent.

GIDEON, J.

The defendants were officers of a corporation known as the Salina Orchard & Loan Company, hereinafter designated orchard company. A. J. Crosier was president, Carl Forshee vice president, and J. H. Nelson secretary and treasurer, of said orchard company. These, with the other two defendants, made up its board of directors. J. H. Nelson was not served with summons and did not appear in the action.

The complaint alleges the corporate existence of the orchard company; that the defendants were the officers and directors thereof; that in February, 1911, the defendants, to induce the plaintiff to render certain services for such corporation in becoming its agent in the negotiations and sale of contracts known as "Home Purchasing Investment Contracts," made certain statements and representations, orally and by means of printed circulars delivered to plaintiff, respecting the property and financial responsibility of the orchard company (setting out such statements and representations in detail); that such statements and representations were, each and all,

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false; that said orchard company was insolvent; that it never at any time had any assets other than small amounts paid to it by the incorporators, not exceeding in all the sum of \$1,000; that plaintiff, relying on such statements and representations, was induced to enter into a contract with the said orchard company and on or about February 27, 1911, began performing services for it under such contract and continued such services until May 1, 1911, at which time the orchard company, by its officers, discontinued operations and repudiated its contracts and obligations, including the contract made with the plaintiff. The complaint further alleges that the services so rendered by plaintiff under said contract for such company were reasonably worth the sum of \$1,500, and that no part of the same had been paid him except \$150; that plaintiff expended in renting and fitting up an office to conduct such business the sum of \$150; that the orchard company is, and has been from the date of its incorporation, utterly insolvent and has no property, and never at any time had any property.

The contract between plaintiff and the orchard company (which is attached to the complaint and made a part thereof) appoints the plaintiff its state agent for one year for the negotiation and sale only of "Home Purchasing Investment Contracts" issued by the orchard company and provides that plaintiff shall be allowed a commission on each contract sold. It further stipulates that plaintiff shall maintain an office at his own expense during his employment. There are other provisions in the contract, but they are not material here. The defendants, served with process, filed an answer in which they admit the corporate existence of the orchard company and deny all of the other allegations of the complaint. Trial was before the court without a jury. Findings of fact and conclusions of law were made and filed in favor of the plaintiff and against all of the answering defendants. Judgment was entered for \$330, with interest on that amount from May 1, 1911. From that judgment the answering defendants appeal.

Various assignments of error are made by appellants, but we shall consider only those determinative of this appeal.

The complaint is assailed as not stating a cause of action. The gist of plaintiff's action is that he was fraudulently induced by the defendant to enter into a contract with the orchard company upon the faith of certain false 1 and fraudulent representations made to him by the defendant and upon which he relied. Six elements necessarily enter into the representations and acts of the parties in order to constitute actionable deceit, namely:

"First, that the representations were made as alleged; second, that they were made in order to influence the plaintiff's conduct; third, that, relying upon them, the plaintiff did enter into a contract; * * * fourth, that the representations were untrue; fifth, that the plaintiff suffered damage from the action he was induced to take; and, sixth, that the damage followed proximately the deception." 2 Cooley on Torts, p. 906.

Tested by this standard does the complaint in this action state a cause of action?

It is alleged that representations were made to induce the plaintiff to enter into the contract; that he relied upon them, and did enter into the contract with the orchard company; that the representations so made by the defendants were false; that by reason of the same he gave his time and services to the interest of the orchard company; and that he was damaged by the loss of time. It will thus be seen that the complaint contains all of the allegations required to state a cause of action. For that reason the contention that the complaint does not state a cause of action cannot be sustained.

That part of the complaint alleging damages by reason of the loss of profits that the plaintiff would otherwise have made detracts nothing from plaintiff's right to 2 recover for loss of time which was induced by the false representations of the defendants.

It is further contended that the evidence does not support the findings. There is but little dispute in the testimony. Plaintiff stated positively under oath that 3 before entering into the contract he had an interview or conversation with the defendant A. J. Crosier, who is the president of the orchard company, and further testified:

"Q. Just state what the conversation was. A. I talked with Mr. Crosier about the proposition they had there, the proper-

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ties they had, and their ability to make good, keep their part of the contracts, and he assured me everything was just as represented in the literature they had given to me; that they owned that tract of land down there, selling it, subdividing it and selling it in unit, acre, two acres, five acres; that it was owned by the company and would be used to furnish funds as fast as sold to provide for these loans that would be called upon by these holders of these contracts that I was to sell. Q. Did you rely on what he told you? A. Yes, sir. Q. And as an inducement to enter into this contract? A. Yes, sir."

This testimony is not disputed. The literature referred to in plaintiff's testimony above quoted, among other things, says: "Contracts guaranteed by over \$200,000 worth of real estate." It is true that defendant Crosier denied that he was responsible for the literature issued by the company, that he made any positive or definite representations as an inducement or otherwise to plaintiff to cause him to enter into the contract with the orchard company, but the court found that such representations were made, and that they were made for the purpose as claimed by the plaintiff, and that the plaintiff relied upon the same in entering into the contract.

Plaintiff testified, and the court so found, that he devoted his entire time to the interest of the orchard company as provided by the terms of the contract, and that his services were reasonably worth \$500 per month. The court found that the plaintiff was entitled to recover \$330 for such 4 time and services with interest from May 1, 1911, and judgment was entered against all defendants appearing in the action. So far as the defendant A. J. Crosier is concerned there can be no question that there is substantial evidence in the record to support the findings made by the district court. As to the remaining defendants we are unable to find any testimony in the record to warrant or support the court's finding that they, either jointly or severally, ever made any representations to or with the plaintiff, or in fact had any conversation with him respecting the assets of said orchard company. In fact, two of the defendants plaintiff had never met, and Mrs. Nelson, one of the defendants, only in a very

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casual way. There is nothing to show that either of these defendants knew of, or had anything to do with, the issuing of the literature upon which plaintiff relied or was in any way responsible for its issuance unless the mere fact of being directors of the orchard company would make them responsible for any literature issued by that company. We do not consider that the testimony is sufficient to support the findings of the court against any of the defendants except A. J. Crosier.

Appellants' attorneys, in their brief, have devoted considerable argument to the question of the right to recover damages, and insist that any profit plaintiff might have made, if he had been permitted to continue his contract with the orchard company, was dependent wholly upon his 5,6 ability to induce people to purchase the contracts authorized to be sold by him, and any compensation or proceeds that plaintiff might receive were, therefore, purely problematical and speculative and cannot be the basis of an action for damages. In that contention we think counsel are clearly correct, but there is no evidence offered in support of that allegation of the complaint and no findings were made thereon. That question is therefore not in the case.

It is also contended by appellants that the compensation plaintiff was to receive was fixed by the provisions of the sixth paragraph of the contract, that is, that he should receive "a commission on each contract sold" by him or his agents and the amounts and times of payment are 7 fixed in the contract; and that, having fixed the value of his services, he is bound by the terms of the contract, and that having received such compensation he is not entitled to recover any other or greater amount. Let it be remembered that this is an action founded upon deceit, and not for a breach of contract. The basis or right of the plaintiff to recover is not upon the terms of the contract, but upon the deceit practiced upon him by the false representations of the defendants whereby he was induced to devote time and services to the interest of the orchard company, and therefore the reasonable value of his services during such time is the amount he is entitled to recover. The contract having been induced by

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fraud is not binding upon the plaintiff, and the terms thereof, fixing plaintiff's compensation, cannot be invoked by the defendants in support of their own fraud. "Fraud destroys the validity of everything into which it enters. It vitiates the most solemn contracts, documents, and even judgments." 12 R. C. L. p. 231. The testimony of the plaintiff is that at least one-half of the time devoted to the orchard company under its contract was given in an effort to establish subagents and in corresponding with others over the state in an effort to interest them in the purchase of the contracts which he was authorized to sell. In other words, he was doing preliminary work in an effort to organize agencies from which he would later, during the life of the contract, reap or realize a benefit. It is a matter of common knowledge that to successfully conduct an agency, such as plaintiff undertook, a certain amount of preliminary work in the way of organization is necessary before any substantial returns are received or sales made. We are of the opinion that the work done by the plaintiff was such as would be reasonably required or expected as preliminary work for his duties provided in the contract and, for that reason, he would be entitled to receive what the time was reasonably worth which he gave to the orchard company and which was induced by the false representations and statements of the defendant Crosier.

We are unable to determine just how the district court arrived at the particular amount for which judgment was given, but as that is much less than the amount testified to by the plaintiff, and as there is no other testimony bearing on this point, appellant Crosier cannot complain, as he is not injured by that finding. 8

It follows from the foregoing that the judgment as to the defendants Maggie Crosier, Carl Forshee, and Alice O. Nelson should be reversed, and, as to them, a new trial granted, and should be affirmed as to the defendant A. J. Crosier. Such is the order. Neither party to recover costs on this appeal.

FRICK, C. J., and McCARTY, CORFMAN, and THURMAN, JJ., concur.

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JONES et al. v. WILLIAMSON et al.

No. 2854. Decided October 2, 1917. (168 Pac. 110.)

1. **NEW TRIAL—MOTION—NOTICE—REQUISITES.** Comp. Laws 1907, section 3294, requiring a party intending to move for a new trial to serve upon the adverse party notice of such intention, does not require such notice between codefendants, all of whom joined in preparing a bill of exceptions and in serving it, and also joined in the appeal and were properly before the court, the service of such notice in such case being a futile thing. (Page 448.)
2. **EXCEPTIONS, BILL OF—TIME TO FILE.** Where defendants moved separately for new trials, without serving on each other notice of intention to do so, the time for filing and serving the bill of exceptions commenced to run from the time the order was made striking such motions. (Page 449.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by R. Jones and others against J. W. Williamson and others.

Judgment for plaintiffs. Defendants appeal.

REMANDED with directions to modify in part, otherwise judgment affirmed.

Parker & Robinson for appellants.

A. C. Hatch and *E. A. Walton* for respondents.

STATEMENT OF FACTS.

This is an action for the rescission of a contract and for the recovery of damages for the breach thereof, and for the cancellation of certain promissory notes executed by the plaintiff, except D. N. Murdock, at the time of and in connection with the making of the contract.

To reverse the judgment rendered in favor of plaintiffs defendants have appealed the case to this court.

The facts and circumstances leading up to, and which culminated in, the making of the contract and in the execution of the promissory notes referred to are briefly stated by counsel for plaintiffs, in their printed brief, as follows:

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“In 1911, the defendants J. W. Williamson and Juel Moody had a jack at Heber City, Utah, which they were offering for sale. Upon arriving at said Heber City, they met the plaintiff D. N. Murdock, and entered into an agreement with him whereby they promised and agreed with said Murdock, if he would aid and assist them in inducing other persons to jointly purchase the said jack, that they would make the price of the jack \$2,000, in shares of \$200 each, and would give to Murdock one share for such service. Murdock was known to the plaintiffs, having been in like business, and having a knowledge of the value of such animals, and he undertook to and did, with the two defendants Williamson and Juel Moody sell the jack for the sum of \$2,000, and received from the defendants the \$200 share thereof. The other defendants gave their notes to J. W. Williamson and Company, for \$1,800 payable in one and two years from the date of the sale.”

Certain issues presented by the pleadings were submitted to the jury, who returned a special verdict thereon in favor of plaintiffs and against defendant J. W. Williamson. The court adopted the special verdict of the jury, and made findings of fact in harmony with and responsive to the special verdict or findings returned by the jury, and made findings of fact on certain issues that were not submitted to the jury.

The court's findings of fact and conclusions of law, so far as material in determining the questions presented by the appeal, are as follows:

“Findings of Fact.

“(1) On the 25th day of February, 1911, plaintiffs bought from defendants J. W. Williamson and Juel Moody a jackass, called ‘Utah,’ and paid therefor the sum of \$1,800, in 18 notes of \$100 each, two of which were signed severally by each of the plaintiffs, except the plaintiff D. N. Murdock. (2) That said two defendants warranted the said jackass to be an imported registered jack, and to be a reasonable sure foal getter, and that, in case he were not such, said defendants would replace him with another jack of the value of \$2,000, or refund the said purchase price. (3) That said jack, if as warranted, would be of the value of \$2,000, but if not as warranted, would

be of no value. (4) That said jack was not as warranted, and was of no value, and he was not replaced as agreed or otherwise, neither was the purchase money refunded, except that another jack of little value was furnished for a time, at an expense to the plaintiffs of freight of \$15. (5) That the expense reasonably and necessarily incurred by the plaintiffs in the care and keep of said jack, 'Utah,' up to the time of this trial, has been and is the sum of \$900. (6) That due notice was given by the plaintiffs of said breach of warranty. (7) That said notes were negotiable in form, and all payable to J. W. Williamson or order. * * * (8) That the defendant Milton Moody has produced in court seven of said notes described as follows (describing in detail each note). * * * (9) Seven other of said notes were, shortly after the date thereof, turned over to the defendants Juel Moody and Milton Moody, five of which have been paid by some of the plaintiffs, and two of which are outstanding, apparent liabilities of the makers thereof. (10) Four other of said 18 notes are outstanding and apparent liabilities of some of said plaintiffs, the signers thereof. (11) None of the defendants is or was the holder in due course of any of said notes. (12) That plaintiffs have been damaged by reason of the said breach of warranty in the sum of \$915.60 for the keep of the jack, 'Utah,' and the freight paid on the second jack, and have been further damaged in the sum of \$1,800, with interest thereon from February 25, 1911, at 7 per cent. per annum, less the amount of the seven notes, Exhibits 9 to 15 inclusive, produced in court and held for cancellation.

"Conclusions of Law.

"From the foregoing facts the court concludes: (1) That the plaintiffs are entitled to a rescission of said contract of purchase and sale of said jack, 'Utah.' (2) That defendants are entitled to have delivered to them the said jack, 'Utah,' upon payment of the judgment herein, and upon paying to plaintiffs the further amount of the reasonable cost of keeping said jack from the 5th day of March, 1915. (3) That plaintiffs are entitled to judgment against J. W. Williamson and Juel Moody for the sum of \$1,410, with interest thereon from this

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date at the rate of 7 per cent. per annum, and the further sum of \$915.60, with interest thereon from this date at the rate of 8 per cent. per annum, together with the costs of this suit. (4) That plaintiffs are entitled to judgment against defendant Milton Moody for a delivery up and cancellation of the seven notes above described and marked Exhibits to 15, inclusive, and for the sum of \$897, with interest at 7 per cent. per annum from this date, together with the costs of this suit; said money judgment against Milton Moody, when paid, to operate as a satisfaction pro tanto of the above-mentioned money judgment against J. W. Williamson and Juel Moody.

“Dated this 26th day of March, A. D. 1915.”

Each of the defendants filed a motion for a new trial alleging therein that the motion was made “in his own behalf, and not in behalf of the other defendants or either of them.” One of the grounds upon which the motions filed by the defendants Milton Moody and Juel Moody were based is “that the decision and judgment is against law.” These motions were filed March 30, 1915.

On April 30, 1915, the court, on motion of counsel for plaintiffs, struck the motions made by Juel Moody and Milton Moody for a new trial, on the ground, as stated by the court in ruling on the motion to strike, that “the motion of Juel Moody has not been served on Milton Moody, and the motion of Milton Moody has not been served on Juel Moody, and neither motion purports to have been served on the defendant J. W. Williamson, or counsel for him.”

McCARTY, J. (after stating the facts as above).

We are confronted at the threshold of this appeal with a motion to strike the bill of exceptions. The ground alleged is that the “time had expired within which to serve bill of exceptions when the same was served.”

Judgment was rendered March 26, 1915. On March 30, Milton and Juel Moody filed their motions for a new trial, which were stricken April 30, 1915. It is, in effect, conceded that if the filing of these motions tolled the time for preparing, filing, and serving the bill of exceptions, the subsequent

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orders of the court granting additional time in which to file and serve bill of exceptions were timely, and that the order allowing and settling the bill of exceptions on September 1, 1915, as disclosed by the record, was regular and proper and that the motion to strike should be denied. Counsel for respondents contend that, as each of the appellants Juel and Milton Moody failed to serve his codefendants with notice of his intention to move for a new trial, the court was without jurisdiction to hear and determine the motions on their merits.

The purpose of the statute requiring a party intending to move for a new trial to "serve upon the adverse party a notice of his intention" in that regard evidently is to give such adverse party an opportunity to appear and resist the motion, or take such action in relation thereto as he may deem proper. In the case at bar the defendants were in precisely the same situation respecting the means and opportunities of exercising and protecting their rights in the premises as they would have been if they had joined in the filing of one motion, or one of them only had filed a motion and served each of his codefendants with notice thereof. It is not claimed, nor can it be successfully urged, that plaintiffs, or either of them, were in any sense, directly, remotely, or otherwise, prejudiced because defendant did not serve his codefendants with notice of his intention to move for a new trial.

The defendants joined in preparing the bill of exceptions and in serving it on the plaintiffs, and also joined in the appeal, and hence are properly before the court. The service, therefore, of notice by each defendant on his codefendants of his intention to move for a new trial would 1 have been of no service or benefit whatever to either of them or to the plaintiffs, and hence it would have been a vain and useless act to make such service. This the law neither requires nor contemplates. Section 3294, Comp. Laws 1907, requiring a party intending to move for a new trial to serve upon the adverse party notice of such intention, is taken, substantially, from the statutes of California (Cal. Code Civ. P. section 659), and the Supreme Court of that state, in *Barn-*

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hart v. Fulkerth et al., 92 Cal. 155, 28 Pac. 221, held, and we think correctly, that a failure to serve an adverse party with notice of intention to move for a new trial may be a reason for denying the motion and for affirming such order on appeal, but it does not constitute a reason for the dismissal of the appeal upon the ground that the court has not acquired jurisdiction to hear it. This doctrine is reaffirmed by the California court in *Re Ryer*, 110 Cal. 556, 42 Pac. 1082 and *Johnson v. Phoenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719. In the California cases the motions were to dismiss the appeal.

In this case, as stated, the motion is to strike the bill of exceptions. The principle involved, however, is the same. The striking of the motions by the trial court 2 was tantamount to denying the same. The time, therefore, for filing and serving the bill of exceptions commenced to run from the time the order was made striking the motions.

The motion to strike the bill of exceptions is, for the reasons stated, denied.

In the assignments of error appellants assail the judgment on the ground that it is not sustained by the evidence. The evidence taken at the trial consists of about 220 pages of type-written matter. We shall not attempt to set forth the evidence even in a condensed form. To do so would subserve no good purpose. We have examined the evidence with care, as the same appears in the bill of exceptions, and are clearly of the opinion that there is ample evidence to support the judgment. We are, however, of the opinion that the portion of the court's fourth conclusion of law, wherein it is held "that plaintiffs are entitled to judgment against Milton Moody * * * for the sum of \$879," and the part of the decree based thereon, cannot be upheld. Neither the jury by their special verdict nor the court in its decision found any fact or facts that in any sense tend to support a judgment against Milton Moody for \$879, or for any other sum of money, except for costs. By referring to the findings of fact set forth in the foregoing statement of the case it will be observed that they negative rather than support an inference or conclusion that plaintiffs,

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or any of them, are entitled to a money judgment against Milton Moody.

The cause is remanded with directions to the trial court to modify the conclusions of law and the decree by eliminating therefrom the \$879, constituting the money judgment against Milton Moody. In all other respects the judgment is affirmed. Plaintiffs to recover costs.

FRICK, C. J., and CORFMAN, THURMAN and GIDEON, JJ., concur.

KOLB v. PETERSON, Sheriff.

No. 3154. Decided October 3, 1917. (168 Pac. 97.)

1. **CRIMINAL LAW—SENTENCE—ENTERING JUDGMENT OF RECORD—STATUTE.** In view of Comp. Laws 1907, section 5080, providing that neither departure from the form or mode prescribed by the Code of Criminal Procedure in respect to any pleading or proceeding, nor any error or mistake therein shall render it invalid, unless it actually prejudiced defendant in respect to a substantial right, under Comp. Laws 1907, section 5154, providing that, after a plea or verdict of guilty, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless defendant waives the postponement, or the judgment is arrested, or new trial granted, and that, unless such postponement is demanded, it shall be deemed to be waived, in a prosecution in a municipal court for the crime of drunkenness, where sentence of defendant after his plea of guilty was rendered September 21st, but not entered of record until September 27th, by its failure to enter the judgment of record as soon as practicable after sentencing defendant, as it should have done, the court did not lose jurisdiction of the case, and the sentence did not become illegal. (Page 452.)
2. **DRUNKARDS—OFFENSE—PROHIBITION LAW.** By the Prohibition Law (Sess. Laws 1917, c. 2) section 21, providing that any person who shall, in any street or alley, public place, store, restaurant, hotel lobby or parlor, or in or upon any passenger coach, street car, or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station, or room, or at any public gathering, drink any intoxicating liquors of any kind, or shall be drunk or intoxicated, shall be deemed guilty of a misdemeanor, drunkenness and intoxication by the use of intoxicating liquors are criminal, wherever and whenever they may occur at any place in the state. (Page 453.)

Petition for Habeas Corpus

Petition for habeas corpus by Henry Kolb against H. C. Peterson, Sheriff of Weber County.

WRIT DENIED.

A. G. Horn for plaintiff.

Dan. B. Shields, Atty. Gen., *Jas. H. Wolfe* and *O. C. Dalby*, Asst. Attys. Gen. for defendant.

THURMAN, J.

This is a proceeding in habeas corpus. The petitioner was charged in the municipal court of Ogden with the crime of drunkenness in Weber County, but the complaint did not state that the crime was committed in any one of the places specifically named in section 21 of the act prohibiting the manufacture and use of intoxicating liquors, etc. Ch. 2, Sess. Laws 1917. The petitioner pleaded guilty to the offense charged and was sentenced to pay a fine of \$50, and in default of payment to be imprisoned in the county jail at the rate of \$1 per day for every dollar of fine. The fine was not paid and the defendant was imprisoned. Sentence was rendered on the 21st of September, 1917, but was not entered of record until the 27th day of the same month, the date on which the petition was filed in this court.

The petitioner relies upon two points: (1) That, by reason of the judgment not being entered within two days after the plea of guilty, the court lost jurisdiction of the case; (2) that there is no statute which makes drunkenness a crime, except where it occurs in one of the places specifically named in section 21 above mentioned. It is manifest that if either of these contentions is true the court was without jurisdiction, the sentence was illegal, and the petitioner should be discharged.

The petition itself admits that the sentence was rendered by the court. It is also, in effect, admitted that the complaint is sufficient, if there is any law making drunkenness a crime outside of the places mentioned.

Therefore the only question to be determined concerning the first point relied on is, did the court lose jurisdiction in not entering the judgment of record within two days after the plea of guilty. The only basis for the petitioner's contention that the sentence should have been recorded within two days is found in Comp. Laws, Utah, 1907, section 5154, which reads as follows:

"After a plea or verdict of guilty, or after a verdict against the defendant, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless the defendant waives the postponement, or the judgment is arrested, or a new trial granted. If postponed, the court may hold the defendant to bail to appear for judgment. Unless such postponement is demanded, it shall be deemed to be waived."

In this case there was no demand; postponement was, therefore, waived, and sentence rendered immediately. It will be noted that the section quoted says nothing about entering the judgment of record; nor do we find any specific requirement to that effect in any section of the code of criminal procedure. Nevertheless, to enter the judgment of record, as soon as practicable after sentencing the prisoner was the prudent thing to do, and the same should have been done in this case. For failure to do so, however, the court did not lose jurisdiction of the case, and the sentence did not thereby become illegal. 15 R. C. L., p. 578; *Coleman et al. v. Roberts*, 113 Ala. 323, 21 South. 449; *Hall v. Tuttle*, 6 Hill (N. Y.) 38, 40 Am. Dec. 382, and note; *Sibley v. Howard*, 3 Denio (N. Y.) 72, 45 Am. Dec. 448; *Hickey v. Hinsdale*, 8 Mich. 273, 77 Am. Dec. 450, and note; *Holmes v. Pennsylvania R. Co.*, 74 N. J. Law, 469, 66 Atl. 412, 12 Ann. Cas. 1031; 23 Cyc. 838, par. E; 23 Cyc. 839, par. 3. Besides this, the procedure relating to justices' courts pertinent to this case is a part of the Code of Criminal Procedure, and chapter 55 of that Code (Laws 1907, section 5080) provides as follows:

"Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein shall render it invalid, unless it shall have

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actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

We cannot perceive wherein the failure to enter judgment of record prejudiced the petitioner in any substantial right. The court did not thereby lose jurisdiction, nor was the sentence, if valid when rendered, thereby rendered invalid or illegal.

The second proposition upon which petitioner relies is of vastly more importance because, if petitioner's contention is sound, the ultimate purpose and very object of the law passed by the last Legislature known as the Prohibition Law will be rendered almost entirely abortive and ineffectual.

Section 21 of the statute above referred to, and under which the complaint was drawn, reads as follows:

"Any person who shall, in any street or alley, public place, store, restaurant, hotel lobby or parlor, or in or upon any passenger coach, street car, or upon any other vehicle commonly used for the transportation of passengers, or in or about any depot, platform, waiting station, or room, or at any public gathering, drink any intoxicating liquors of any kind, or shall be drunk or intoxicated, shall be deemed guilty of a misdemeanor."

The contention of petitioner is that to be drunk or intoxicated under that section constitutes a crime only when it occurs in some one of the places specifically named; while the respondent contends there are two offenses created by the section, one, for drinking only, which must occur at some one of the places named, and the other, for being drunk or intoxicated, which may occur at any place, whether public or otherwise.

It is also contended by the petitioner that there is no statute at all making drunkenness a crime except in the places specifically enumerated. It is admitted by respondent that there is no statute making drunkenness a crime outside 2 of such places, unless respondent's construction of the statute in question is adopted. This contention on the one side and admission on the other presents a question of more than ordinary importance to the people of Utah.

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The history of the prohibition propaganda in this state leading up to the passage of the law in question is so recent and fresh in the minds of the people as to be a matter of common knowledge. Every political party in the state, in the political campaign of 1916, declared unequivocally in its convention in favor of absolute state-wide prohibition. The Governor and every member of the Legislature, before the election, was solemnly pledged to give force and effect to these platform declarations as soon as practicable after the Legislature convened. The purpose and object of the legislation which the people demanded was the suppression of drunkenness and intoxication in the State of Utah. The prohibition of the sale and traffic in intoxicating liquors except under the strictest and most rigid regulation was but means to the end that drunkenness and intoxication should cease to exist in every part of the state. The Legislature, by the law in question, even went so far as to make it unlawful for any person within the state to knowingly have in his possession any intoxicating liquors, except as provided in the law itself. In view of these conditions and circumstances, it seems strange and unreal, and almost unbelievable, that the Legislature could have purposely omitted to make drunkenness a crime in every part of the state wherever it might occur, whether in the streets or other public places named in the section of the statute in question, or otherwise. The suppression of drunkenness and intoxication, as above stated, was the ultimate end to be accomplished and the primary purpose for which the law was enacted. It would, indeed, be a severe impeachment of the intelligence of every member of the Legislature, the Governor, and his legal advisers, if it should develop that, after all, the law fails to make drunkenness a crime except in the places specifically mentioned.

This court, in view of the circumstances and conditions enumerated, cannot approve of the construction contended for by petitioner. If the Legislature really intended the law to mean what the petitioner contends, it was not as happy in its mode of expression as it might have been had it used a simpler and more natural arrangement of the language used to express

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its intention. Had the section been made to read: "Any person who shall drink any intoxicating liquors of any kind or be drunk or intoxicated in any street, alley, public place, etc., shall be deemed guilty of a misdemeanor," there could have been but one possible meaning drawn from the language used, and that would have been the meaning now contended for by petitioner. But the Legislature did not so write the section, but wrote it in such form as to require a construction in complete harmony with what must have been its manifest intention.

We are unanimous in our opinion that the statute in question makes drunkenness and intoxication by the use of intoxicating liquors a crime, wherever and whenever it may occur at any place in the state.

It is therefore ordered that the writ be denied.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

WHALEN v. UNION PACIFIC COAL CO.

No. 2984. Decided October 4, 1917. (168 Pac. 99.)

1. **MASTER AND SERVANT—RELATION OF PARTIES—TERMINATION.** Where a coal mining company, which maintained in its mine an electric railway for hauling coal, carried its men from their working place to the surface, by such railway and a connecting cable railway, the relation of master and servant continued until the employees were taken to the surface and departed from the cars, and were no longer under the control of the company or amenable to its rules and regulations.¹ (Page 461.)
2. **MASTER AND SERVANT—LIABILITY FOR INJURIES—ELECTRICAL APPLIANCES.** A coal mining company, which maintained an electric railway on which its men were transported from their working places to the main slope leading to the surface, was not negligent in maintaining the trolley wire about five feet and seven inches above the track, and only fourteen inches horizontally outside of and away from the tracks where it appeared that to increase the height of the tunnel by breaking the roof as it existed at the time the coal was mined and

¹ *Jachetta v. San Pedro, L. A. & S. L. R. Co.*, 36 Utah, 482, 105 Pac. 100, 52 L. R. A. (N.S.) 1106; *Grow v. O. S. L. R. Co.*, 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915 B, 481.

removed therefrom would create a greater danger by reason of the material overhead falling. (Page 462.)

3. **MASTER AND SERVANT—LIABILITY FOR INJURIES—ELECTRICAL APPLIANCES.** The company was not negligent in failing to house and guard the trolley wire, where it appeared that any metal guard would become as dangerous as the wire itself, while, if it were made of wood, slight falls of top coal or roof rock would break it and leave spines hanging down, thereby increasing rather than diminishing the danger incident to the use of the road. (Page 463.)
4. **MASTER AND SERVANT—LIABILITY FOR INJURIES—DEGREE OF CARE REQUIRED.** A master is not required to use more than ordinary care and diligence to provide his servant reasonably safe ways of ingress and egress to and from the place of work. (Page 464.)
5. **MASTER AND SERVANT—LIABILITY FOR INJURIES—CUSTOMARY APPLIANCES.** In providing instrumentalities, appliances, and safeguards, a master's duty is performed by providing those that are in common use by others engaged in the same business, and that are reasonably safe and suitable for the purposes for which they are intended and the use to which they are applied.¹ (Page 464.)
6. **MASTER AND SERVANT—ASSUMPTION OF RISK—ELECTRICAL APPLIANCES.** Where a mine employee was, and for a considerable period had been, familiar with the location of trolley wire with reference to car tracks and cars on which the men were transported from their working place to the main slope of the mine, and fully understood and appreciated the dangerous character of the trolley wire when carrying a heavy current of electricity, and the probable fatal result to a person coming in contact with it, he assumed the risk and hazards, all of which were obvious and presumably known to him. (Page 469.)
7. **MASTER AND SERVANT—LIABILITY FOR INJURIES—WARNING—FAILURE TO COMPEL OBEDIENCE.** Where a mining company, which transported its men from their working place to the main slope of the mine on an electric railway through a low tunnel, had a man at the place where the men boarded the cars to warn them to stand back until the electric current was turned off, it was not necessary, to relieve it from liability for death caused by contact with the trolley wire, that it should use physical force to prevent the men from prematurely boarding the cars, because of their desire to ride in the cars nearest the motor so as to be in a better position to be taken up the main slope on the first trip. (Page 469.)
8. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—TAKING DANGEROUS POSITION.** An employee of a mining company who boarded

¹*Fritz v. Elec. Light Co.*, 18 Utah, 500, 56 Pac. 90; *Both v. Eccles*, 28 Utah, 456, 79 Pac. 1918.

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a car, used in taking the men from their working place to the main slope of the mine, by attempting to step on the bumper and climb over the end instead of the side of the car, thereby coming in contact with the trolley wire, was negligent, where it was recognized by the employees, and presumably known to the one in question, that it was extremely dangerous and hazardous to board the car in this way, and he did it merely to avoid the probable inconvenience of waiting ten or fifteen minutes for the second trip up the main slope.¹ Page 470.)

9. **MASTER AND SERVANT—ACTION FOR INJURIES—DEGREE OF CARE—“ORDINARY CARE.”** A master who maintained electric wires carrying a high or dangerous quantity of electrical energy was not bound to exercise the “greatest care and prudence to prevent injury to his employees”; a master’s duty to his employees being performed by using ordinary care for their safety, and “ordinary care” is that degree of care which ordinarily prudent and careful persons would ordinarily exercise under the same or similar circumstances, though when the danger is greater, the degree of care required to constitute ordinary care is greater. (Page 470.)

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action by Thomas A. Whalen, administrator, against the Union Pacific Coal Company.

Judgment for plaintiff. Defendant appeals.

REVERSED with directions.

Geo. H. Smith, J. V. Lyle, B. S. Crow and C. R. Hollingsworth for appellant.

John G. Willis, S. T. Corn and Geo. Halverson for respondent.

STATEMENT OF FACTS

This is an action by Thomas A. Whalen, as administrator of the estate of Pero Vucovich, against the Union Pacific Coal Company, a Wyoming corporation, hereinafter referred to as company, to recover damages for the death of Vucovich alleged to have been caused by the negligence of the company. A trial was had to a jury in the district court of Weber County.

¹*Fris v. Elec. Light Co.*, 18 Utah, 500, 56 Pac. 90; *Roth v. Eccles*, 28 Utah, 456, 79 Pac. 1918.

which resulted in a verdict in favor of plaintiff in the sum of \$2,357.14. To reverse the judgment rendered on the verdict the company prosecutes this appeal.

The facts, briefly stated, are about as follows:

On October 17, 1913, Pero Vucovich was, and for about three years had been, in the employ of the company as a laborer in one of its mines, referred to in the evidence as mine No. 10. This mine consisted of a system of tunnels and subterranean rooms. The company maintained an electric lighting system to illuminate the interior portion of the mine, and to supply electrical power to haul and transport coal from the interior of the mine to the surface. The mine is entered through a tunnel referred to in the evidence as the "main slope." This tunnel has a somewhat steep descent from its portal into the interior of the mine. On its course it is intersected by various tunnels, referred to by the witnesses as "entries." One of these, known as No. 5 or main entry, is nearly level, and is equipped with an electric railway and coal cars. These cars are propelled or drawn by an electric motor with trolley pole attached thereto, and connected with an overhead trolley wire, which is suspended from the roof of the tunnel by uninsulated hangers fastened with screws or blocks of wood in the roof of the tunnel. The equipment is somewhat similar to that of an electric street railway system. The trolley wire was close to the wall and ceiling on the lower side of the entry, and as far away from the men and the cars as it could be placed. It was uninsulated and unguarded, except that at manways or landings, where men are continuously passing to and fro under it, there is a wooden boxing or guard for a distance of ten or twelve feet. The main, or No. 5, entry is a little more than two miles long, and approximately ten feet wide and from six to seven feet high. The height varies with the height or thickness of the vein of coal through which the tunnel passes. This entry is intersected at various points at approximately right angles by other tunnels known as "stopes." These stopes have a gradual pitch or incline, so that, on traveling along No. 5 entry, the intersecting stopes ascend on the one side and descend on the other.

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The stopes are numbered 1, 2, 3, 4, 5, etc. Coal is mined in the various rooms and chambers connecting with the various stopes that intersect the main, or No. 5, entry, and is transported in cars running on tracks along the stopes to the main, or No. 5, entry. When the cars loaded with coal, ascending or descending the slopes, as the case may be, reach the main entry they are coupled to an electric motor and taken along the almost level track in the entry to the main slope, where they are uncoupled from the motor and fastened to a cable, and by means of a hoist are hauled to the surface, where the coal is unloaded into a tipple and screened.

At the point where the accident in question occurred, and for a considerable distance along the entry in either direction, there is a double track. The floor and roof of the entry slope laterally to a certain extent, because of the tip or incline of the seam of coal through which the entry extends. Where the track is double there is a "high side track" on one side and a "low side track" on the other side of the tunnel or entry. The high track is used as the passageway for the empty cars, and the lower track on the other side of the tunnel or entry is used for the transportation of the loaded cars. The cars are seven feet long, three feet six inches wide on top, and three feet three inches high above the rails of the track. The distance from the top of the rails to the trolley wire is four feet eight inches. At or near the intersection of No. 5 slope with the main entry, a small tunnel leads off from and parallels the entry in the direction of the main entrance to the mine, and returns to and intersects the main entry a few hundred feet from slope No. 5. This tunnel is referred to in the evidence as "run round." When the motor returning from the main slope with a train of empty cars pulls onto the upper track near slope No. 5, it frequently happens that both tracks are blocked, the upper track with the empty cars attached to the motor and the lower track with loaded cars. On such occurrences the motor is detached from the empty cars, taken through the "run round" and brought upon the main tracks of the entry at the end of the train of cars nearest the mouth of the tunnel, and then is attached to the loaded cars and

draws them to the foot of the main slope. The "run round" is a species of switch used for the purpose of transporting the motor from one end of a train of coal cars to the other. The accident in question occurred on the main track, about midway between the points where the terminals of the "run round" intersect the main tracks. Since the installation of the electric railway system in the mine, it has been the custom for the men employed in the interior of the mine, on quitting work at the end of a shift, to assemble at a place selected by the company and wait until the empty cars come in for them, and then board such empty cars and ride to the foot of the main slope, at which point they are transferred to another train of empty cars and hauled to the surface by means of a hoist. The trip on which the men are taken from the interior of the mine to the surface is called the "man trip." At the time of the accident, and prior thereto, there was a manway, free from the dangers incident to trolley wires and moving coal cars, leading from the interior to the surface of the mine, in which the men could walk if they so desired. Eighty-two feet outward from where the accident occurred there is an automatic switch connected with the trolley wire. The switch can be operated by means of a stick of wood or it will operate automatically when the trolley wheel passes over it.

It was customary for the motorman in charge of the man trip, after he brought the cars in from the foot of the main slope and placed them in position for the men to board them, to transfer the motor to the rear end of the train of empty cars by taking it through the "run round," and, if the men remained in the place where they had assembled to wait for the man trip, to walk down to the switch and disconnect the current from the wire extending toward and over the train of empty cars. The men were supposed to remain at the place where they had assembled until this man trip was made up and the signal given by the motorman for them to board the cars, after he had shut off the current from the wire extending to and over the empty cars. The men quite frequently, in fact they generally, boarded the cars before the motorman gave the signal. The reason for this was that when the man

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trip reached the foot of the main slope it ordinarily required two trips up the slope to convey all the men to the surface. Therefore those who were in the front cars of the man trip would have a better opportunity, on arriving at the foot of the main slope, to get into the cars there and be hauled to the surface on the first trip than the men who were in the rear of the man trip cars.

McCARTY, J. (after stating the facts as above).

The alleged negligence pleaded in the complaint is: (1) That the company maintained unguarded and uninsulated the trolley wire mentioned in the foregoing statement of facts "at a distance of only about five feet and seven inches perpendicularly above, and only about fourteen inches horizontally outside of and away from, said tracks"; (2) that it "failed to maintain a watchman to warn said employees when the current was on the wire, and inform them when it was safe to board the man trip"; (3) that it failed and neglected to turn off the current of electricity from the trolley wire before permitting its employees to board the man trip; (4) that it failed to establish and enforce rules forbidding its employees to board the man trip before the current was turned off. The company denied that it was negligent in any of the particulars alleged in the complaint, and pleaded assumption of risk and negligence on the part of the deceased.

Counsel for respondent contend that when the deceased, Vucovich, quit work on the afternoon of, and just before, the accident in question occurred, the relation of master and servant ceased to exist, for the time being, between him and the company, and that, when he boarded the man trip, and at the time he was killed, the relation between him and the company was that of carrier and passenger, and that therefore the assumption of risk rule has no application in this case. We do not agree with counsel. The relation of master and servant continued to exist until the employees boarding the man trip were taken to the surface of the mine, departed from the cars, and were no longer under the control of the company or amenable to its rules and regulations.

Jachetta v. San Pedro, L. A. & S. L. R. Co., 36 Utah, at page 482, 105 Pac. 100, 52 L. R. A. (N. S.) 1106, *Grow v. O. S. L. R. Co.*, 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915B, 481, and cases cited.

When plaintiff's evidence was in and he had rested his case in chief, the company moved the court for a nonsuit. The grounds upon which the motion was based were: (a) That there was no evidence tending to show that the company was negligent, or that the death of Pero Vucovich was caused by the negligence of the company or any of its employees; (b) that the evidence affirmatively shows that the condition of the trolley wire was known to the deceased, and that the risks incident to, and the dangers resulting from, the maintenance of the wire were open and obvious and were appreciated by him, and that he assumed the risk, etc. When the evidence was all in and both sides had rested, the company requested the court to instruct the jury to return a verdict in its favor. The overruling of the motion and the refusal of the court to give the requested instruction are assigned as error.

The evidence shows that the height of the entry or tunnel in which the accident occurred varies with the height or thickness of the seam of coal through which the entry extends, and that there are but few, if any, places where the distance between the floor and the roof is less than six 2 feet. The undisputed evidence also tends to show that it would be impracticable to increase the height of the entry by breaking the roof as it existed at the time the coal was mined and removed therefrom, as it would create an additional element of danger.

W. J. Hallett, a mining engineer, who was, at the time of the trial, and for nearly ten years prior thereto had been, in the employ of the company and was familiar with the workings and conditions of the mine at the time of the accident, testified—and his evidence on this point is not disputed—that in mining coal it is impracticable to break the roof of the seam “any more than is absolutely necessary”; that when the roof is broken the material overhead is hard to hold up and “continually falls and makes a dangerous condition,” and that it

is better "to put up with a little less height in a narrow seam than to break the roof and introduce that element of danger."

The alleged negligence, however, mainly relied on by plaintiff, respecting the unsafe condition of the entry where the accident occurred, was the failure of the company to adjust and guard the trolley wire so as to prevent the men from coming in contact with it when they boarded the 3 man trip. Counsel for plaintiff contend with much earnestness that the company's failure in that regard is sufficient to support a finding by the jury that the company was negligent. We think counsel's position is untenable, because the evidence, without conflict, tends to show that the dangers and risks of the employment would be increased rather than diminished by housing and guarding the trolley wire. Mr. Hallett, the mining engineer referred to, testified—and his evidence is not disputed—that:

"It would be more dangerous to fence the trolley wires than it would be to leave them as they are. Any fence would have to be of wood—if it was metal it would be shorted on account of the moisture in the mine, and would become as dangerous as the wire itself, * * * and if it were made of wood slight falls of top coal or roof rock would break it and leave spines hanging down, which, when running the loaded trips out, the motorman would be running into. Also it would make it more or less dangerous on the same point for the man trips because those falls occur all the time."

George Blackel, a practical coal miner of many years' experience, and who was, at the time of the accident, state coal mine inspector of the district in which the mine in question is located, testified, in part, as follows:

"I inspected that mine in August, 1913, and then I inspected it about three months afterwards. I am familiar with the mine entry clear back to slope No. 5. * * * In my judgment the methods and appliances and machinery, and in particular the manner in which the trolley wire is left unguarded, and this distance between the floor and the roof, and the distance of the trolley wire from the floor and its

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position to the cars, is favorable with the other mines, and in many of them excels them."

He further testified:

"I have been inspector since 1911. * * * I am familiar now, and was in the month of August and at the time I made the inspection, * * * with the condition of other mines in my district in Wyoming. * * * I inspect these mines once every three months. * * * In none of the other mines in my district are there electric wires, which are used for trolley wires in the mines, guarded in any manner. In my judgment, as a mining man, it is not practicable to place any guards around these trolley wires, except at the manways where the men pass to and fro under them."

Andrew Bone, a practical miner of much experience, who was in the employ of the company, and who was at the place of the accident when it occurred, testified, in part, that:

"The size of the wires, their position and condition, so far as their being insulated or uninsulated are concerned, compare favorably with the general usage in the other mines I have worked in. I never saw any better conditions in a mine than what were in No. 10 Rock Springs"—the mine in question.

Other witnesses testified, substantially, to the same thing. As we have pointed out this evidence is not disputed in any particular.

The rule is elementary that the master is not required to use more than ordinary care and diligence to provide his servant reasonably safe ways of ingress 4 and egress to and from the place of work.

In providing instrumentalities, appliances, and safeguards, the master's duty in that regard is performed by providing those that are in common use by others engaged in the same business, and that are reasonably safe and are 5 suitable for the purposes for which they are intended and the use to which they are applied. 1 Shearman & Redfield, Neg. sections 194, 195; 26 Cyc. 1108; *Fritz v. Elec. Light Co.*, 18 Utah, 500, 56 Pac. 90; *Roth v. Eccles*, 28 Utah, 456, 79 Pac. 918.

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The evidence is all but conclusive that the company in the case at bar discharged every duty imposed on it by law to use ordinary care and diligence to furnish and equip the entry, prior to and at the time of the happening of the accident, with proper and suitable appliances and safeguards. Furthermore, the undisputed evidence tends to show that if the company had done what counsel for plaintiff contend it should have done, placed guards about the trolley wire, it would have increased rather than have diminished the dangers incident to the maintenance of the wire.

The contention that the company failed to establish and enforce rules forbidding its employees to board the man trips before the current was turned off the trolley wire, and hence was guilty of negligence, is unavailing. As pointed out in the foregoing statement of facts, when the man trip loaded with men arrived at the main slope it usually required two trips from that point to take the men to the surface. Owing to the desire of the men to be taken out of the mine on the first trip up the slope, there was more or less of a scramble among them when they assembled to board the man trip to get into the front cars or those nearest the motor, as those who succeeded in doing this would have a better opportunity, on arriving at the main slope, to board the first cars leaving the bottom of the slope for the surface than those who were in the rear cars of the man trip. The evidence of the witnesses for both plaintiff and defendant—evidence that is not in conflict in any particular—shows that the company, prior to and at the time of the accident, had a man, known as the "Safety First" man, stationed in the main entry near where the men in No. 5 slope assembled for the purpose of boarding the man trip; that a part of his duties was to keep the men at the place where they had assembled until the man trip was made up and a signal given by the motorman in charge of the train for the men to board the cars; that on many occasions prior to the accident the "Safety First" man was unable to control the men; that they persisted, notwithstanding the protests made by him, in leaving the place where they were assembled and in rushing to the man trip and boarding it as soon as it

arrived, and while the motor was being transferred from one end of the string of empty cars to the other; that this state or condition of affairs existed at the time of the accident. Red Morris, a witness for plaintiff, testified that he, on the day of the accident, and for "a couple or three months" prior thereto, had been working in slope No. 5; that he and Vucovich belonged to the same crew or shift of men; that

"We had a man to stop us every night who told us to stay back and wait until the cars got up, and the motorman went back and shut off the switch. * * * He tries to hold us back, but we don't want to stay back, because if we do we will miss the first trip going up. * * * On this occasion when this man got killed * * * we heard the cars coming and we were all down, and there was a man there with us who tried to hold us back, and said, 'Don't come'; * * * the fellow, Jack Love, who was there with us in charge said, 'Stay back boys; wait.' We were waiting for the trip. At the time when the man got killed the motor was coming around over the switch."

Pete Japuncich, another of plaintiff's witnesses testified on this point as follows:

"I had known Pero Vucovich * * * about five years. * * * I saw him on the day he was killed. * * * I saw Jack Love there that night, and have seen him there before. The only thing he does with the men when they are waiting for the man trip, just stop them until the trip gets ready for them, and then says, 'All right.'"

Andrew Bone, a witness for defendant, testified:

"I saw the accident. * * * When we were rushing down to get on the man trip there was a foreman or 'Safety First' man there—Jack Love. He was telling us to keep back. * * * On this occasion Jack Love had given no signal when the men came down. He was swearing at us to keep back. * * * The night of the accident, Pero Vucovich was about two cars in front of me. That night he was told to keep back, he was among the crowd."

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Ralph J. Buxton, another witness for defendant, who was mine foreman at the time of the accident, testified in part as follows:

"Pero Vucovich and these other workmen, prior to the accident, were told about the wires being charged with electricity. I instructed them to always be careful of those wires, because it was loaded heavy with electric current. They were told to stay back there until the man trip was made up. I told Pero and these other workmen, prior to the accident, to stay back until the trip was made up. I told them that quite often, extending back a period of perhaps five months prior to the accident. That was repeated on more than one occasion during that period."

Thomas Foster, a witness for defendant, testified that at the time of the accident he was assistant mine foreman in the mine in question, and that:

"I gave instruction down there to the men, when Pero Vucovich was among them, in regard to holding back until the man trip was prepared. I told them to wait there until the man trip was gathered and that they were notified to come down. * * * When Pero Vucovich was among the men I have told them about the wires being dangerous. * * * Pero Vucovich was working in that mine when I went there. I had been there about four months when he got killed."

Another witness testified that, while Pero (deceased) was there:

"I heard the remark many times by the mine foreman and the assistant, both, to look out for the wires. About a week before the accident happened there was a man that came in contact with the wire, and Pero and I were standing together this night, and I told him those wires were dangerous and to look out for them."

Another witness who was present and saw the accident testified that:

"The night when the man [Vucovich] got killed we all were waiting up on top where we were supposed to wait, on Five Slope; and when we heard the motor come in we all got

up on our feet, and started to come down. * * * Jack Love was there with us. He tried to hold the boys back but we were too many against him, and he could not hold us."

There is much more evidence in the record of the same import as the foregoing, none of which is disputed. This is, in effect, conceded. Counsel for plaintiff, in their printed brief, say:

"The facts in the case are comparatively simple. There is but little dispute or contradiction."

The men, in boarding the man trip, were supposed to climb over the side of the cars. By entering in this manner, the men do not come in close proximity to the trolley wire which the evidence shows is suspended from the roof of the entry opposite from the side of the cars where the men enter them. In the rush and scramble of the men to get into the front cars of the man trip, occasionally one of them would enter by stepping on the bumpers and climbing over the end instead of the side of the car. The evidence shows that this was recognized by the men as a dangerous way of boarding the man trip when the trolley was charged with electricity, because it brought the party adopting it in close proximity to the trolley wire. Red Morris, plaintiff's principal witness, testified on this point, in part, as follows:

"I knew it was dangerous to step on the bumpers. Sometimes I did it myself, and I took a chance when I got on the bumpers of coming in contact with the wire."

Another witness, who, the evidence shows was familiar with the mine and the equipment thereof, testified:

"Unless a man wanted to commit suicide, there was only one way of getting into the car—that is going over the side."

Vucovich, instead of boarding the man trip on the occasion in question from the side—the usual and comparatively safe way—stepped on a bumper between the cars, and was in the act of climbing over the end of one of the cars when he slipped and fell against the live trolley wire, and received an electric shock from which he died a few hours later.

Counsel for plaintiff, in their printed brief, seem to contend, if we correctly understand their position, that there is

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no evidence tending to show that Vucovich "slipped" when he stepped onto the bumper of a car on the occasion referred to.

William A. Hill, a witness for defendant, testified on this point as follows:

"Vucovich came in between this car I was in and the one ahead of me. * * * He was stepping up on the bumper and he slipped onto the wire."

On cross-examination the witness testified:

"The man was in the process of falling when I seen him slip. * * * I saw him slip. I couldn't help but see his feet. * * * I saw his feet go up, so I just naturally says he slipped."

Whether Vucovich slipped and fell, or fell against the car without slipping, is not of controlling importance. Practically all of the witnesses who saw the accident testified that the deceased, when he stepped on the car bumper, "fell."

We have examined the record with more than ordinary care, and are of the opinion that the only inference permissible from the facts under the present state of the record is that the company discharged every duty it owed to the deceased, under the contract of employment, re- 6, 7 specting the matter alleged in the complaint as negligence. On the other hand, we are equally confirmed in our opinion that the only inference deducible from the facts in evidence, to which we have referred, which correctly reflects the record, is that Vucovich, at the time of the accident, and for a considerable period prior thereto, was familiar with the location of the trolley wire with reference to the car tracks and the cars at the place where he and his colaborers boarded the man trip, and that he fully understood and appreciated the dangerous character of the trolley wire when carrying a heavy current of electricity, and the probable fatal results to a person coming in contact with it. He must, therefore, under the circumstances, be held to have assumed these risks and hazards, all of which were obvious and presumably known to him. *Fritz v. Electric Light Co.*, 18 Utah, 493; 56 Pac. 90; 26 Cyc. 1236. Furthermore, Vucovich, on the occasion in question,

boarded the man trip prematurely, in violation of positive orders given, and in the face of emphatic protests made by the "Safety First" man. It seems that about the only thing the "Safety First" man could have done that he did not do to enforce his orders in that regard was to use physical force. This he was not required to do to relieve the company from liability for damages sustained by Vucovich or his collaborators because of their intentional and willful disobedience of orders. Shearman & Redfield, Neg. section 270b; 26 Cyc. 1267.

The deceased, also, of his own volition, boarded the man trip in a way recognized by the employees of the company (and under the circumstances presumably known to him) to be extremely dangerous and hazardous, instead of boarding it in the usual and customary way, which in- 8
volved but little, if any, danger. It appears that he did this to avoid the probable inconvenience of waiting ten or fifteen minutes after the man trip arrived at the main slope before being taken out of the mine. He was, therefore, as a matter of law, guilty of negligence—negligence that resulted in, and was the proximate cause of, his death.

The law fixing liability under the circumstances indicated is tersely stated in Shearman & Redfield on Negligence, section 89, as follows:

"When the question is one of mere inconvenience, and not actual danger, some moderate risk may be taken, if there is no obvious danger. But the plaintiff will be chargeable with contributory negligence if he runs the risk of an obvious and serious danger merely to avoid inconvenience." *Fritz v. Electric Light Co.*, supra; *Bunker v. U. P. E. Co.*, 38 Utah, 592, 114 Pac. 764; *Bailey Mast. Liab.* p. 169; 26 Cyc. 1248.

The court instructed the jury "that, where a master maintains electric wires carrying a high or dangerous quantity of electrical energy, he is *bound to exercise the* 9
greatest care and prudence to prevent injury to his employees," etc. The company excepted to the giving of that part of the instruction which we have italicized, and, in particular, to the word "greatest."

It would seem, on first impression, that, in view of the disposition made of the assignment of error hereinbefore considered, this assignment is of no importance. But since

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the judgment must be reversed and the cause remanded for a new trial, we shall briefly consider the assignment.

The law, as declared by the great weight of authority, is that the master's duty to his employees is performed by using ordinary care for their safety, and that "ordinary care" when applied to the duty of a master is that degree of care which ordinarily prudent and careful persons would ordinarily exercise under the same or similar circumstances. The greater the danger the greater the degree of care required to constitute ordinary care. In *Words and Phrases*, vol. 6, p. 5032, it is said:

"Ordinary care means just what the words say. It is defined by our courts all over the civilized world in plain terms and is this: Just such care as a reasonably careful and prudent man—not a cautious man, not an extraordinarily cautious man, but a reasonably careful and prudent man—would exercise under the circumstances then existing and surrounding him. * * * It is not the highest care, it is not extraordinary watchfulness, but such reasonable care as a man, under the circumstances, being reasonably prudent and careful, would exercise and ought to exercise."

In *Commonwealth Elec. Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052, the court says:

"Ordinary care exercised by those who make a business of using it [electricity] for a profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger."

Attention is also invited to *Words and Phrases*, vol. 6, pp. 5029 to 5042 inclusive, and also to vol. 3 (N. S.) pp. 774 to 788, inclusive, where numerous authorities are cited and many excerpts from decisions, both state and federal, are quoted.

These authorities almost uniformly approve of the foregoing definition or construction of the term "ordinary care." While there are a few authorities that contain expressions which seem to approve of instructions couched in language similar to that excepted to in the instruction under considera-

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tion, yet the great weight of authority seems to hold, and we think correctly, that the language here excepted to imposes a higher degree of care on the master than that described and defined as "ordinary care." *Missouri Pac. Ry. Co. v. Gibson*, 56 Kan. 661, 44 Pac. 612; *Watts v. Murphy et al.*, 9 Cal. App. 564, 99 Pac. 1104; *Sappenfield v. Main St., etc., Co.*, 91 Cal. 48, 27 Pac. 590; *Texas Cent. Ry. Co. et al. v. Lyons* (Tex. Civ. App.) 34 S. W. 362; *Van Blarcom v. Cent. R. Co.* (1916) 73 N. J. Law, 540, 64 Atl. 112; 3 Labatt, Mast. & Serv. section 907.

For the reasons stated, the judgment is reversed with directions to the lower court to grant a new trial. Appellant to recover costs.

FRICK, C. J., and CORFMAN, THURMAN, and GIDEON, JJ., concur.

**PRATT v. AMALGAMATED ASSOCIATION OF STREET
AND ELECTRIC RAILWAY EMPLOYEES
OF AMERICA et al.**

No. 2949. Decided May 8, 1917. Rehearing denied October 4, 1917. (167 Pac. 830.)

1. **TRADE UNIONS—EXPULSION OF MEMBER—RIGHTS.** An expelled member of an unincorporated association of electric railway employees was only entitled to a hearing in accordance with the laws and rules of the association. (Page 481.)
2. **TRADE UNIONS—EXPULSION OF MEMBER—NECESSITY OF NOTICE.** The expulsion of a member of trade association without notice or opportunity to be heard is void. (Page 481.)
3. **TRADE UNIONS—EXPULSION OF MEMBER—REVIEW BY COURT.** Where plaintiff was not expelled from a trade association nor condemned without a hearing, but his appeal after being denied admission to one local order upon transfer from another was not taken up owing to member's honest opinion that he was not entitled to appeal, the court will not review and annul officers' acts relating to plaintiff. (Page 482.)
4. **TRADE UNIONS—ACTS OF OFFICERS—REVIEW BY COURT.** Courts are not authorized to review rulings of regular constituted officers of a trade association, relating to its internal affairs, and hence would not interpret constitutional provision, it being the officers' duty to

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construe such provisions, and the fact that different officers arrived at different conclusions was immaterial. (Page 484.)

5. **TRADE UNIONS—REINSTATEMENT OF EXPELLED MEMBER—ACTION AGAINST UNION.** Mandamus will not lie to compel reinstatement of an expelled member of a trade association where, owing to nonresidence of defendants, the decree could not be enforced. (Page 485.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Mandamus by Clarence O. Pratt against the Amalgamated Association of Street and Electric Railway Employees of America and others.

Petition dismissed. Petitioner appeals.

AFFIRMED.

Marionaux, Stott & Beck and *Powers & Riter* for appellant.

King, Nibley & Farnsworth for respondents.

FRICK, C. J.

The plaintiff commenced this proceeding to compel the defendants as the "officers, the executive board and the executive council of the Amalgamated Association of Street and Electric Railway Employees of America," a voluntary association, to reinstate him as a member of said association, and also as a member of one of the local divisions of said association, and to restore him to all of his rights in the association. The complaint, with attached exhibits, covers 40 pages of the printed abstract, and thus is too voluminous to be inserted in this opinion. We can do no more, therefore, than to make a brief outline of the allegations contained in the pleadings.

In the complaint it is in substance alleged that the defendants named in the caption constituted the officers, etc., of the Amalgamated Association of Street and Electric Railway Employees of America, hereinafter called association; that the plaintiff is a member of said association, and that the same is a voluntary unincorporated association having its

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principal office and place of business at Detroit, Mich.; that it had under its control subsidiary associations, or what are hereinafter called local divisions, in the various states of the United States, and in Canada; that the plaintiff formerly was a member of Local Division No. 6 of said association, located at Cleveland, Ohio, and that he thereafter, in due course, became a member at Detroit, Mich., and thereby continued his membership in good standing in said association; that he thereafter, in May, 1901, was elected a member of the general executive board of said association and was, at each general election thereafter held, re-elected to said position until 1911; that in September, 1911, desiring to become a member of Local Division No. 477 of Philadelphia, he in accordance with the constitution and laws of said association, applied for and received a withdrawal card which gave him the right to become a member of said local division, and he accordingly was accepted and became a member thereof, and thereafter, continued to be, and now is, a member in good standing of said Local Division No. 477; that in order to permit the plaintiff to be admitted into said local division and to make him eligible to hold the position of business agent, the by-laws of said local division were suspended, and that a protest was filed against plaintiff's election as a member of said division and to the position aforesaid by the secretary-treasurer of said Local Division No. 477; that in December, 1911, the president of said association attempted to suspend said Local Division No. 477; that without a hearing on said protest the executive board of said association ruled that plaintiff was not eligible to hold said position of business agent, and held that the by-laws aforesaid should not have been suspended, and should not be, except in extreme cases; that plaintiff complied with the ruling of said executive board and withdrew from said position of business agent, but both the plaintiff and said Local Division No. 477 gave notice that they appealed from the ruling of said executive board, stating the grounds for their appeal; that the next biennial general convention of said association was held at Salt Lake City, Utah, from September 8, to September 17, inclusive, 1913, at which

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meeting the defendants concealed and suppressed said notice of appeal and thus arbitrarily prevented said convention from considering the same, and said defendants refused to give plaintiff and the members of said Local Division No. 477 a hearing on said appeal; that no charges had ever been preferred against the plaintiff, and that he demanded that charges be preferred against him, and that he be given a hearing upon the decision of said executive board whereby he was declared to be ineligible to membership in said Local Division No. 477, and to the position aforesaid, and that said decision be rescinded; that under the laws and the constitution of said association plaintiff, if in good standing, is entitled to sick, funeral, and other benefits of the aggregate value of \$1,000 from the funds of said association; that the plaintiff has been arbitrarily and illegally deprived of the right of receiving said benefits, and that he has been denied a hearing upon all questions involved on said appeal. Other similar grievances are alleged in the complaint, but nothing could be gained by going into further detail regarding those allegations.

Upon substantially the foregoing allegations the district court of Salt Lake County issued an alternative writ of mandate requiring the defendants to comply with the matters stated in the writ or to show cause by a time fixed why they did not do so. Motions to quash the writ and demurrers were filed thereto, all of which were overruled, and the defendants filed their joint answer to the complaint. It must suffice to say that while the defendants admitted many of the allegations of the complaint, yet they denied all wrongs attributed to them and all the rights claimed by the plaintiff, and affirmatively averred that the plaintiff was without right to make the claims set forth in the complaint; that all the matters set forth in the complaint had been adjudicated in a former proceeding in the courts of Pennsylvania; that another action involving the same questions presented in this proceeding was now pending in the state courts of Pennsylvania; that the district court was without jurisdiction; that the plaintiff unlawfully, and without being qualified to become such member, attempted to become a member of said Local Division No. 477,

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and that by reason of his wrongful acts he "became excommunicated from and severed all relations with said association."

While, as before stated, the case originated as a mandamus proceeding and an alternative writ was duly issued, to which the defendants responded, yet the case was ultimately tried as an equitable proceeding. The plaintiff, in support of the allegations of his complaint, produced a large mass of evidence, documentary and otherwise, all of which he presents to this court in his bill of exceptions, consisting of between 700 and 800 closely typewritten pages. It is not possible to state or to review the evidence without extending this opinion beyond all reasonable limits. It is, however, not necessary to do so for the purposes of this decision. When plaintiff rested his case the defendants moved the court for a nonsuit and dismissal of the complaint. The court granted the motion and entered judgment dismissing the complaint, from which judgment plaintiff prosecutes this appeal. While plaintiff's counsel originally assigned a large number of errors, yet, in their printed brief, they have only argued the general proposition that the court erred in dismissing the complaint and in not requiring the defendants, as the officers of said association, to reinstate the plaintiff as a member thereof and as a member of Local Division No. 477. The trial court, in disposing of the case, filed a written opinion, which is made a part of the record. In view that the trial court, in that opinion, fully reflects the gist of the evidence and covers what we deem the real questions in the case, we take the liberty of inserting that opinion in full. It reads:

"Throughout the trial of this case the court has considered very carefully the nature of the cause of action set out in the amended complaint upon which the case is being tried, and it seems to the court that the underlying principle of the complaint is this: That the plaintiff claims that the international officers did not have power to do certain things, that is, to suspend the Philadelphia Local No. 477, and to pass upon the eligibility of Mr. Pratt to hold office in that local and his qualifications to be a member of that local. If the interna-

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tional officers had power in these matters and exercised it in good faith, I take it the plaintiff has no right to complain. The plaintiff is bound, if he is a member of this association, by all the by-laws and by the constitution of the amalgamated association; and if the board, or if the international officers acted not in good faith, he would have a right to complain of such arbitrary action on their part.

“Now, in the first place, the court is of the opinion that the international board did have power, expressly given it in conjunction with the international president, to rule upon all questions of law, the manner of construction of the laws of the association, and did have power to suspend locals expressly given it by this constitution and these by-laws.

“Then, in the second place, the court comes to the question of whether or not this power was exercised arbitrarily and not in good faith. The court finds no reason to conclude, from the evidence of the plaintiff and the plaintiff’s case, that the officers did not act in good faith. The power given these international officers is quite arbitrary. I have no doubt it is necessary, to the successful maintenance of an organization of this sort, that the international officers should have very great power, and, certainly, very great power is conferred upon the international officers by the constitution of this association; but there is nothing in the evidence in this case that indicates that the power was exercised not in good faith.

“And, further, the court is of the opinion that when this withdrawal card was given Mr. Pratt from the Detroit office that he then ceased to be a member of the amalgamated association. The card itself so states, and I think that is the only conclusion that can be drawn from section 125 of the constitution. If he desires to use that card in going into some local of the amalgamated association, it takes the place of an application; and upon filing that withdrawal card with a local division, he thereby makes application for membership, as I understand these by-laws and this constitution. Then he must comply with all the requirements of the constitution and by-laws before he is entitled to membership. That is to say, he must be working at the occupation, and if the withdrawal

card comes from the Detroit office, the fact of his application must be referred to the Detroit office.

“The court is of the opinion that Mr. Pratt never did become a member of the Philadelphia Local No. 477 of the amalgamated association. He made application for membership in that local by filing his withdrawal card there; and it is true that a card, or that several working cards were issued to him for successive months following the filing of his withdrawal card as an application for membership in that local. Those working cards would be prima facie evidence of membership in the association; but the fact of membership is contested and must be tried out upon all the facts and all the circumstances surrounding the transaction itself as disclosed by the evidence and in the light of the constitution and by-laws of the association; and they expressly provide that the applicant is not eligible for membership in the local unless he is working at the occupation and, when the withdrawal card comes from the Detroit office, until the application is referred to the Detroit office and a satisfactory reply is received from the Detroit office, whereupon the member's application may be accepted by the local division. The conclusion of the court is that Mr. Pratt is not a member and never was a member of the Philadelphia Local of this association, No. 477. It follows, from the views of the court herein expressed, that the international officers were entirely justified, under the constitution and by-laws of the amalgamated association, in ruling as they did that Mr. Pratt was not qualified for membership in the Local Division No. 477.

“The court is further of the opinion that the international officers had power to suspend that local and that they did suspend the local as set out in the pleadings, and that all those persons who were then members of that local ceased at that time to be members of the local. Local No. 477 was shortly afterwards reinstated upon the petition of a large number of the suspended members, and arrangements were made that these members who had been suspended could come back into membership, with their seniority rights restored. A way exists under the constitution and laws of the association

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for all those members to protect whatever property rights they had in the association; and even if Mr. Pratt were a member of that Local No. 477 at the time of the suspension and could not join the reinstated local because of the fact that he was not working at the occupation, yet he still had an opportunity to return his card to the Detroit office and become a member at large, which would retain for him all his property rights. So that it seems to the court that there is and was at that time, and may be still, for aught the court knows, a plain and adequate method pointed out by these by-laws and constitution, for the plaintiff to protect every property right that was in any way jeopardized by reason of the suspension or the rulings of the international officers as to his membership or as to his right to hold office in Local No. 477. Under those circumstances, equity will not act; it is unnecessary that a court of equity should take any action in the matter, because the party himself has a plain way open for the protection of his rights.

“Under the circumstances disclosed by the evidence in this case I think the motion for a nonsuit should be granted and the plaintiff’s petition dismissed.”

Section 125 of the constitution referred to in the foregoing opinion reads as follows:

“When a member withdraws from this association by card, his membership ceases from the date of the issuance of such withdrawal card, and he is no longer entitled to any of the benefits of this association.”

The withdrawal card issued to the plaintiff that is referred to by the court in the foregoing opinion reads as follows:

“This is to certify that Brother C. O. Pratt, whose signature appears in the margin hereof, was a member of the Amalgamated Association of Street and Electric Railway Employees of America, holding his membership in accordance with section 130 of the general constitution, and that he has paid all dues and demands and withdrawn in good standing from membership of the association on the date of this issuance of this card.

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“Given under our hand and seal this 30th day of September, 1911.

“W. D. Mahon,

“[Seal.]

International President.

“Signature of Bearer: C. O. Pratt. J. S.”

Section 130, to which reference is made in the foregoing card, reads as follows:

“Where divisions have disbanded and the membership has been referred to headquarters or where members hold their membership directly through the general association and the members desire withdrawal cards they shall apply directly to the general office for the same, and where members on withdrawal cards from the general office seek membership in L. D.’s they shall deposit their cards and the local secretary shall notify the International Office and upon receiving a satisfactory reply accept the member’s withdrawal card and place him in good standing in the L. D.”

The real cause for all of plaintiff’s grievances and the differences existing between him and the defendants, as officers of the association, seems to date from the time that plaintiff was held not to be eligible to membership in Local Division No. 477, and hence not qualified to hold the position of business agent as stated in the complaint. That matter was, however, fully considered and decided by the proper officers of the association. The record shows that when plaintiff applied for membership in Local Division No. 477 he did so upon the withdrawal card before referred to and pursuant to the provisions of section 130, both of which we have set forth in full. The decision upon that question is made a part of the record, and it appears therefrom that the plaintiff had full opportunity to be heard, that he was heard, and that the questions presented for decision were fully considered and apparently were decided in full accordance with the laws of the association. After reviewing the case, a portion of the decision reads as follows:

“The decision of the general executive board is that under the laws of the association, member C. O. Pratt cannot

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become a member of Division No. 477, under his present qualifications.

"The general executive board hereby directs that the withdrawal card be returned to member C. O. Pratt.

"The general executive board further rules that member C. O. Pratt may, at his own volition, return his card to the International Office and so retain his membership, and the International President is so instructed."

That decision seems to be the sum and substance of all of plaintiff's grievances. To set forth what occurred after that would require us to write a volume. It must suffice to say that the things that are complained of by the members of Local Division No. 477, and by the plaintiff, date from and arise out of that decision. While plaintiff insists that his rights have been trampled upon and ignored by reason that he was not permitted to present his appeal to the convention held at Salt Lake City, Utah, as before stated, yet what he asked the trial court to do, and what he demands at our hands, is, that the defendants be required to reinstate him as a member in good standing of Local Division No. 477 as well as a member in good standing of the association at large.

If it be true that plaintiff has been denied a hearing on appeal, and that his rights in that regard have been denied him, then the remedy he should invoke is that he be given the right to be heard on appeal in accordance with the rules and laws of the association of which he contends 1, 2 he is a member. All that a member is entitled to is a hearing in accordance with the laws and rules of the order or association of which he is a member. That is just what is decided by the cases cited by plaintiff's counsel, namely, *State v. Corgiat*, 50 Wash. 95, 96 Pac. 689; *Venezia v. Italian Mut. Ben. Soc., etc.*, 74 N. J. Law, 433, 65 Atl. 898; *Horgan v. Metropolitan Mut. Aid Ass'n*, 202 Mass. 524, 88 N. E. 890; *Grassi Bros. v. O'Rourke*, 89 Misc. Rep. 234, 153 N. Y. Supp. 493; *Wicks v. Monihan*, 130 N. Y. 232, 29 N. E. 139, 14 L. R. A. 243. The gist of all of those decisions is stated in the headnote of the case first cited in the following words:

"The expulsion of a member from a fraternal benefit association without notice or opportunity to be heard is void."

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Plaintiff was not expelled from the association, nor was he condemned without a hearing. True, he asserts that he was denied a hearing on appeal. The reason assigned by the officers of the association, as we understand the record, however, is, that at least many of the delegates 3 composing the convention to which the appeal was taken and the officers of the association insisted that the plaintiff was not entitled to an appeal, and for that reason his appeal was not considered or passed on. Now, it may be that the delegates to that convention and the officers of the association, including defendants, were all mistaken in their conclusion. There is, however, as the trial court stated, no evidence to justify a finding that the members did not act in good faith; nor is there sufficient evidence to justify a finding that any of the officers of the association, including all of the defendants, acted in bad faith. All we could do, therefore, would be to review the acts and proceedings of officers of the association and the delegates constituting the convention in refusing to hear and pass upon the plaintiff's appeal. Indeed, the whole record before us shows that what is desired at our hands is, that we review the acts and proceedings of the defendants while acting in their official capacity as officers of the association. As pointed out before, the evidence, documentary and otherwise, covers many hundreds of closely typewritten pages. The proceedings of the officers of the association are set forth at large. Now if, as in the cases cited above, the only question presented here was whether the plaintiff had been condemned without a hearing it would not have been necessary to present volumes of documentary evidence. All that would have been necessary to show was that plaintiff had been tried and condemned without notice and without being given an opportunity to be heard in his defense, or that he had been arbitrarily expelled. It is very clear, therefore, that what is asked of us is, that we review the acts and proceedings of the officers of the association in so far as those acts and proceedings affected the plaintiff, and that we annul those acts and proceedings. Courts may not interfere with the acts and proceedings of the officers of beneficial societies or associations to that extent.

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What the courts are authorized to do, and what they will do, in that regard is to compel the officers of such associations, and the associations themselves, to condemn no member and not to forfeit his property or his property rights without a hearing or an opportunity to be heard in his defense according to the laws and rules of the association, and if there are no such rules the court will imply or create such. When such an opportunity is given, however, and the complaining member has been tried and condemned, or has been declared ineligible in accordance with the laws and rules of the order or association, and the acts of the officers of the association in that behalf are free from fraud or duress, courts may not interfere. True, plaintiff complains that no charges were ever preferred against him. Under the constitution, however, personal charges were not necessary to be preferred. The whole controversy arose out of his alleged ineligibility to become a member of, and to hold a certain office in, Local Division No. 477. That question, as we have pointed out, was fully heard and decided. All that follows is but a continuation of that controversy. By reference to that decision it will be seen that plaintiff's withdrawal card was ordered returned to him. He thus was given the right to deposit the card in accordance with the provisions of the constitution, and for aught that the record discloses he may still have that right. Plaintiff, however, insists that it was not a withdrawal card, as held by the officers who rendered the decision referred to, that was issued to him, but that it was a transfer card which entitled him to greater rights than a withdrawal card. The contention that the card was not a withdrawal card is based on a letter written by the president of the association to the plaintiff. That letter reads:

"Detroit, Mich., September 28, 1911.

"Mr. C. O. Pratt, 211 E. Tioga St., Philadelphia, Pa.—
Dear Sir and Brother: Your communication of the 24th, addressed to R. L. Reeves, asking for transfer has been referred to me for answer. In compliance with your request, I hereby forward you your withdrawal card. Of course, you are familiar with our laws upon that subject. The constitu-

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tion specifies in section 129 that withdrawal cards are used as a transfer. As you are aware, there is no other transfer issued but the withdrawal card. So I am forwarding the withdrawal card, as you request, which you can use as a transfer. * * * Hoping this will be satisfactory, and with best wishes, I remain, fraternally yours, W. D. Mahon, International President."

The differences between plaintiff and the officers of the association, however, arose after that letter was written, and the decision which seems to have been the cause of all those differences was rendered nearly ninety days thereafter. In the decision, as we have seen, the card issued to plaintiff was held to be a withdrawal card and was treated as such. If it be assumed, therefore, that the president of the association considered it a transfer card, while the officers who had the power and whose duty it was to decide held it to be a withdrawal card, it was purely a difference of opinion between the president and the officers, and was thus a matter of construction. When all of the different sections of the constitution of the association relating to the rights of members to whom cards are issued are considered in *pari materia*, we are not prepared to say whether the president's or the officers' construction was the right one. In any event the officers not only possessed the right but it was their duty to construe and apply the provisions of the constitution to the best of their understanding and ability. The fact that different officers have arrived at different conclusions regarding certain provisions of the constitution is but natural. What interpretation we might now place upon the constitutional provision in question is of no importance, since we are not authorized to review the rulings of the regularly constituted officers of the association relating to the internal affairs of the association. We are of the opinion, therefore, that, so far as this card is concerned, the president's letter has no controlling influence.

Another important question is raised by the defendants, namely, the power or jurisdiction of this court to grant, and especially to enforce, the relief prayed for by the plaintiff. The record discloses that the defendants live and have

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their homes in different states of the Union, and that at least one lives and has his home in Salt Lake City. Indeed, one or more of them, apparently, lives and has his home outside of the United States, namely, in Canada. The question therefore is raised, assuming that we should enter judgment granting the plaintiff's prayer, how could we enforce that judgment? The question certainly is pertinent, and it seems to us that we possess no such power. True, we might reach the resident member, but he alone could not comply with the judgment if one were entered. No one, we think, will be bold enough to assert that we could enforce our judgment outside of the state. If, therefore, we entered a judgment, and the defendants refused to convene and take the action required of them, by what means could we coerce them to comply with the judgment. Clearly we have no such power, and we know of no case or instance where such power was attempted to be enforced by a state court upon non-residents of the particular state where the proceedings were had and the judgment was entered, and where the office or place of business of the defendants was outside of the state. The Supreme Court of the United States, having jurisdiction over the whole United States, in a proper case, might, perhaps, exercise such a power, but we are fully convinced that we have no such power.

The judgment of the district court is therefore affirmed, with costs.

McCARTY and CORFMAN, JJ., concur.

JAMES v. JENSEN

No. 3027. Decided July 10, 1917. Rehearing denied October 4, 1917. (167 Pac. 827.)

1. **REPLEVIN—COMPLAINT—OWNERSHIP AND RIGHT OF POSSESSION.** The complaint in replevin, alleging in the present tense ownership and right of possession, is sufficient, and allows proof of such ownership and right as of the time of commencement of the action; though action is commenced, as allowed by Comp. Laws 1907, section 2938, by filing complaint, and filing is a few days after the verification; that

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being the form of allegation provided by section 3046 for the affidavit thereby required in such an action.¹ (Page 487.)

2. **APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.** Findings of fact depending on the credibility of witnesses and the weight given evidence are binding on appeal. (Page 493.)
3. **APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.** The only question involved being the identity of a steer, which the court found on sufficient evidence belonged to plaintiff, any error in overruling objection of a question to him calling for a conclusion was harmless. (Page 493.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by David James against Nels Jensen.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Ricy H. Jones for appellant.

John G. Willis for respondent.

FRICK, C. J.

This is an action in replevin, or claim and delivery, as it is denominated in our statute. The plaintiff alleged in his complaint that on "the 15th day of December, 1915, * * * plaintiff was, and still is, the owner of * * * one red steer," describing the animal and giving marks and brands; that during the month aforesaid "the defendant, without plaintiff's consent, and wrongfully, took said chattel from the possession of the plaintiff;" that the defendant wrongfully "withholds and retains said chattel from the possession of the plaintiff," etc. The prayer for judgment is in the usual form in such cases. The defendant answered the complaint, denying the plaintiff's ownership and right of possession of said steer, and averred that the defendant "always has been and now is the owner, possessed and entitled to the possession of

¹ *Savings Bank v. Peterson*, 30 Utah, 475, 86 Pac. 414, 116 Am. St. Rep. 862; *Chambers v. Emery*, 36 Utah, 380, 103 Pac. 1081, Ann. Cas 1912A, 332.

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said steer." A trial to the court without a jury resulted in findings of fact, conclusions of law, and judgment in favor of the plaintiff, and the defendant appeals.

The complaint was verified on the 19th day of January, 1916, but was not filed until the 21st day of said month. No demurrer or other objection was interposed to the sufficiency of the complaint in the court below, but it is contended in this court that the complaint is fatally 1 defective, in that it does not appear therefrom that the plaintiff was the owner, nor that he was entitled to the possession of the steer in question at the time the action was commenced. In support of the contention counsel for defendant cites *Savings Bank v. Peterson*, 30 Utah, 475, 86 Pac. 414, 116 Am. St. Rep. 862, *Chambers v. Emery*, 36 Utah, 380, 103 Pac. 1081, Ann. Cas. 1912a, 332, *Affierbach v. McGovern*, 79 Cal. 268, 21 Pac. 837, *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750, and some other cases which it is not necessary to specially mention here, since the other cases referred to do not discuss nor pass upon the question of pleading. In all of the cases we have cited it was held that a complaint which merely alleges that the plaintiff was the owner and entitled to possession of the property involved in an action at some date prior to the commencement of the action is fatally defective in substance, and states no cause of action. That is, an allegation of ownership and right of possession in the past tense is insufficient. Defendant's counsel contends that the cases before cited control the case at bar.

It must be conceded that the only distinction between the two Utah cases cited by counsel, and this case is that in this case it is alleged that the plaintiff, on a prior date named, was, and that he still is, the owner, etc. That is in the case at bar, ownership and right of possession are alleged in both the past and present tenses, while in the cited cases ownership and right of possession were alleged only in the past tense. The complaint in this case was, however, not filed until the second day after it was verified, and hence it is contended that ownership and right of possession are not alleged as of the time the action was commenced. In view,

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therefore, that the allegation of ownership and right of possession is in the present tense, it follows that if the complaint had been filed on the day it was verified, the objection urged against it would necessarily have to fail. In view, however, that the complaint was not filed until two days after it was prepared and verified, defendant's counsel contends that the action was not commenced until the complaint was filed, and hence there is no allegation of plaintiff's ownership and right of possession on the day the action was commenced. We remark that in this jurisdiction an action may be commenced in two ways. Comp. Laws 1907, section 2938, reads:

"A civil action may be commenced by the filing of a complaint with the clerk of the court in which the action is brought or by the service of a summons."

If an action be commenced by the service of a summons, then, in order to maintain the action, the complaint must be filed within ten days after the service is made. Section 2946. Upon the other hand, if an action is commenced by filing a complaint, the summons, in order to continue the action in force, must be served within three months after the filing of the complaint. It does not necessarily follow, therefore, that, because a plaintiff alleges in his complaint that he was the owner of certain property on a date prior to the day the complaint was filed, he does not allege ownership at the time the action was commenced. Merely to follow the letter of the complaint may lead to serious error. The fact that actions may be commenced in two ways was apparently overlooked when the two Utah cases were decided, but from an examination of the records in those cases it seems the actions were commenced by the filing of a complaint, the allegations of which are in the past tense.

Although this action was commenced by the filing of a complaint two days after the same was verified, yet we think that, in view that the allegation of ownership and right of possession is in the present tense, the complaint is sufficient to withstand a general demurrer, and therefore sufficient after judgment. The allegation in the complaint is that the

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plaintiff, on a day named, was, and that "he still is, the owner," etc. We thus have an allegation in the present tense which is clearly to the effect that plaintiff was the owner when the complaint was prepared and verified on the 19th day of January, 1916. The complaint was, however, not filed until the second day thereafter. If, therefore, it be necessary to allege ownership and right of possession on the precise day on which the action is commenced, then a plaintiff who lives some distance from the county seat, as may be the case, cannot verify his complaint at home unless he can arrange to file it on the same day. We take judicial notice of the territorial extent of Box Elder County, where the action was commenced. We also take like notice of the usual means of transportation and travel in said county, and hence we know that it would be impossible to verify a complaint in many parts of the county and file the same on the day it is verified. What is true in that respect of Box Elder County is likewise true of many other counties in this state. In commencing a claim and delivery action, a plaintiff who lives at a distance from the county seat would thus, of necessity, have to go there before verifying his complaint, or would have to commence the action by service of summons, or make the awkward, and often impossible, allegation that he will continue to be the owner and will continue to be entitled to the possession of the property in question at the time the complaint will be filed, something no other plaintiff is required to do in any other kind of an action where ownership is not only a material, but is the controlling, issue in the case. Why is it not sufficient to allege ownership and right of possession in the present tense in claim and delivery actions if the complaint is filed in due course, as in other cases? Suppose a plaintiff alleges in his complaint that he is the owner and is entitled to the possession of the chattels in question, is that not a sufficient allegation of ownership and right of possession to admit evidence in support of that allegation? The authorities universally hold that the allegation of ownership and right of possession in the present tense is sufficient. Cobbey on Replevin (2nd Ed.) section 531. An examina-

tion of the form books also discloses that there is no other form of allegation respecting ownership and right of possession in replevin actions than the allegation in the present tense. The question, therefore, according to the California rule, is not so much a question respecting the sufficiency of the allegation of ownership and right of possession as it is the commencement of an action.

In the first case cited from the Supreme Court of California, *Affierbach v. McGovern*, 79 Cal. 268, 21 Pac. 837, the complaint was not filed until more than four years had elapsed after it was verified. What was said in that case was therefore said in the light of the facts there presented. No one will contend that a lapse of more than four years between the time when the allegation of ownership (which allegation was in the past tense in that case) was made and the time of filing the complaint was not beyond the bounds of reason. In the case of *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750, it was, however, held that the same rule applied to a case where the complaint was filed the second day after it was verified. In that case the allegation of ownership and right of possession was, however, also in the past tense, and not in the present tense. As before stated, the real question is, when was the action commenced, rather than the sufficiency of allegation. For example, although ownership and right of possession are alleged in the past tense, yet if the complaint is filed on the same day it is verified, and ownership and right of possession are alleged as of that day, no one would contend that the allegation was not sufficient, or that the complaint did not state a cause of action. If, however, the complaint, for some unavoidable reason, cannot be filed until the day following its verification, or not for a few days thereafter, although the allegation of ownership and right of possession is in the present tense, the complaint fails to state a cause of action. This certainly presents an anomaly in pleading. It is pertinent to inquire, therefore, what is a proper test to determine whether the facts alleged are sufficient to permit plaintiff to prove a good cause of action.

The universal test in that regard is whether the evidence that is relevant to the issues, if believed, entitles the plaintiff

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to the relief prayed for in the complaint, or any relief. In other words, the test is whether the evidence that is admissible in support of the allegations of the complaint entitles the plaintiff to judgment. Now why is it that in case ownership and right of possession are stated in the present tense in a complaint which is not filed on the same day it is verified, but is filed within two or ten days thereafter, the plaintiff cannot prove that he was the owner and had the right of possession on the day the complaint was filed? That is, why can he not prove that the ownership and right of possession were in him on the day the complaint was filed, and continued so to be until the day of trial? True, he need not prove ownership and right of possession on a day anterior to the day the action was commenced, although he could do so under an allegation of ownership and right of possession in the present tense. Moreover, under such an allegation, evidence that the ownership and right of possession were in plaintiff when the action was commenced would be relevant, and would be in direct support of the allegation of ownership and right of possession, and so would the evidence that ownership and right of possession continued in the plaintiff at the time of trial, although the latter evidence might not be material. There is, however, a vast difference between irrelevant and immaterial evidence respecting an issue. Logically, and according to fundamental principles, therefore, the allegation of ownership and right of possession in the present tense in a complaint should admit evidence of such ownership and right of possession at the time the action was commenced in replevin cases if, as in other cases, the action is commenced in due course after the complaint was verified. If, now, we pause for a moment to examine the essentials which, under Comp. Laws 1907, section 3046, are required to be stated in an affidavit which must be filed, and which is jurisdictional (Cobbey, Replevin, sections 526-529), we arrive at the same result. That section provides that ownership and right of possession must be alleged in the present tense; that is, the statute provides that the plaintiff must allege that he "is the owner," etc., and that he

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"is entitled to the possession" of the property in question. Nothing is contained in that section, nor in any other, that unless the affidavit is filed on the very day it was verified it, for that reason, is insufficient. Indeed, such a holding would seem most novel, if not absurd. If, therefore, the cases heretofore decided by this court shall be construed as counsel construes them, namely, that although ownership and right of possession are alleged in the present tense, yet, if the complaint be not filed on the day it is verified, if the action be not commenced on that day, the complaint is defective in substance, and the plaintiff may not prove ownership and right of possession on any day after the complaint is filed or the action is commenced, then, in our judgment, those cases lay down a rule which is not only too strict, but is likewise unsound, in that evidence of ownership and right of possession is excluded unless it relates to the very day the complaint is filed or the action is commenced. Assuming counsel's construction of the two Utah cases to be correct—and prima facie at least such is the case—the rule there laid down should not, except for cogent reasons, be disregarded. If a departure from the rule, in view that it has existed in this jurisdiction for some time, affected or might affect, property or other valuable rights, or if it contravened some fundamental principle, or might produce injustice by misleading the bar, we should hesitate long before departing from it, however harsh it might seem to be. The rule, however, merely affects a question of practice or procedure, and to change it cannot mislead, much less harm, any lawyer or any whom he might represent. While, no doubt, the adherence to former decisions, or rules laid down in those decisions, is a judicial virtue, it, like many other virtues, if too rigidly enforced, may easily transcend into a vice. In this connection we remark that we are impressed with what is said by Mr. Justice Field in the case of *Barden v. Northern Pacific Railway*, 154 U. S. at page 322, 14 Sup. Ct. at page 1036, 38 L. Ed. 992, where, in meeting a similar situation, it is said:

"It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous

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declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

We are all of one mind that the rule promulgated by the Supreme Court of California, and followed by this court, is unnecessarily strict, and while it protects no rights, it may easily produce wrong and injustice, and will, in many instances, necessarily impose both public and private inconvenience and expense. We therefore hold that in case ownership and right of possession of the property in question is averred in the present tense in a complaint, the plaintiff may prove such ownership and right of possession, although the complaint was not filed on the day it was verified if filed in due course thereafter. In other words, that where in a claim and delivery action, ownership is alleged in the present tense, it may be proved, as in other cases where ownership is a controlling issue. The decisions in the cases of *Savings Bank v. Peterson*, supra, and *Chambers v. Emery*, supra, so far as they are repugnant to, or in conflict with, the views herein expressed are hereby overruled.

The defendant, however, also insists that the court erred in its findings, and that the findings on certain material questions, in the language of his counsel, "are not sustained by and are contrary to the great weight of the evidence." It is not contended, nor could it be in view of the evidence contained in the record, that there is no evidence to sustain the court's findings. Indeed, defendant's counsel in his brief insists that under the evidence there are 18 reasons why the findings should have been in his favor, while there are but 9 why plaintiff should have prevailed. The trial court, whose province it was to weigh the evidence and to pass on the credibility of the witnesses, concluded that plaintiff's nine reasons should prevail rather than defendant's eighteen, and we are bound by the court's conclusion in that regard.

It is also urged that the court erred in permitting plaintiff to answer the following: "State whether or not that is the same steer that you purchased from Mr. Palmer." The objection interposed, and now urged, is that the question calls for "the conclusion of the witness." The

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court overruled the objection, and the witness answered in the affirmative. Let it be assumed that counsel is right in his contention, yet, in view of the whole record, and inasmuch as the case was tried to the court, no prejudicial error resulted, nor could result, from the ruling of the court. We remark that the only question involved was the identity of a certain steer. Both parties claimed the steer in question, and the court found upon sufficient evidence that the steer belonged to the plaintiff, and not to the defendant, and, so far as we are concerned, that finding must prevail.

The judgment is therefore affirmed. Plaintiff to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ.,
concur.

CLEARY v. DANIELS (Price River Irr. Co. Intervener)

No. 3063. Decided August 8, 1917. Rehearing denied October 5, 1917. (167 Pac. 820.)

1. WATERS AND WATER COURSES—PRESCRIPTIVE RIGHTS—PERIOD OF USE OF WATER—SUFFICIENCY OF EVIDENCE. In suit over the right to use waters of a spring, evidence *held* to show that there was only a certain part of each year within which defendant had used and could use the waters from the spring for irrigation. (Page 498.)
2. WATERS AND WATER COURSES—PRESCRIPTIVE RIGHT—EXTENT—PREVENTION OF USE BY ANOTHER. Defendant, having a prescriptive right to use the waters of a spring for irrigation from May to August, cannot prevent plaintiff from using the surplus water not needed by defendant. (Page 500.)
3. WATERS AND WATER COURSES—PRESCRIPTIVE RIGHTS—BENEFICIAL USE. Though defendant had a prior and paramount prescriptive right to use waters of a spring for irrigation as against plaintiff, she had no right to the waters except as she put them to a beneficial use. (Page 500.)
4. WATERS AND WATER COURSES—APPROPRIATION—QUANTITY. Though the prior appropriator of water acquires the right to use it, he does not obtain title to any specific water, merely acquiring the right to the use of a specific quantity of water for a limited time in each year or during the whole of the year; though the owner has acquired a prior right to the use of water, yet if he does not use it during a portion of the year, or if he cannot make it available by reason of

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natural conditions, he cannot prevent another from using the water while he cannot use it or make it available for use. (Page 501.)

5. **WATERS AND WATER COURSES—APPROPRIATION—RIGHT TO WATER—SUFFICIENCY OF EVIDENCE.** In suit involving the waters of a creek, evidence *held* to support the findings of the court that defendants and an intervener were entitled to the use of all the waters. (Page 501.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by M. J. Cleary against Amelia Daniels, wherein the Price River Irrigation Company intervened.

Decree for defendant and intervener. Plaintiff appeals.

AFFIRMED in part and **REVERSED** in part, and cause remanded, with directions.

Thurman, Wedgwood & Irvine for appellant.

Booth & Booth for defendant.

M. Thomas for intervener.

FRICK, C. J.

Plaintiff's counsel, in their abstract, give a correct synopsis of the allegations of the complaint in the following words:

"The complaint alleged that plaintiff was and is the owner of the north half of the southeast quarter and the north half of the southwest quarter of section 25, township 10 south, of range 7 east, Utah County, Utah.

"That there is a small spring of water on this land which plaintiff at considerable expense had diverted to his house for domestic use.

"That on the 23d day of June, 1915, defendant wrongfully entered upon said land and destroyed plaintiff's ditch and means of diversion of said water and turned the same down the hillside into a canyon, to plaintiff's damage in the sum of \$200.

"Plaintiff prayed for damages in the sum of \$200 and for an injunction."

Defendant in her answer in effect denied all the allegations of the complaint except that there is a spring of water as described in the complaint. The defendant, however, also set up the right to use the waters of said spring by prior appropriation and use for a beneficial purpose, to wit, for the purpose of irrigating her land; and she further alleged that, if the plaintiff is the owner of the land described in the complaint, he acquired title thereto, and especially to the waters of said spring, subject to the rights of the defendant to use the same for the purpose aforesaid. The defendant prayed judgment that the plaintiff take nothing by his action; that she be adjudged to be the owner of the waters of said spring "for the irrigation of her said lands during the irrigation season and for watering stock during the whole of each year." She also prayed for an injunction, and for general relief.

The plaintiff replied to that portion of the answer in which is stated the defendant's right to the waters of said spring, and he restated his claims thereto and reiterated the prayer of his complaint.

The Price River Irrigation Company, a corporation, hereinafter called intervener, filed a complaint in intervention in which it claimed all the waters flowing in the ravine in which said spring is situated, and pleaded two decrees theretofore entered by a court of competent jurisdiction by virtue of which it claimed the right to said waters.

A jury was impaneled to determine the question of damages only, and the court disposed of the whole case respecting the rights of the parties to the waters of said spring. The court, however, also directed the jury to return a verdict of no cause of action in favor of the defendant on the question of damages. The court entered a judgment or decree in favor of the defendant and the intervener and enjoined the plaintiff from interfering with the waters of said spring.

The plaintiff appeals, and insists that the court erred in its findings of fact and conclusions of law and decree.

The plaintiff directs most of his arguments against the findings of fact, conclusions of law, and decree in favor of the intervener. He, however, also assails the findings of fact,

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conclusions of law, and decree in favor of the defendant. For reasons hereinafter appearing, we shall dispose of the appeal against the defendant first.

The spring in question is located near the head of a ravine which in the findings is called "Daniels' hollow." The spring is very near the summit, which divides the watershed, and the ground immediately surrounding the spring is of a very wet or boggy nature. The spring is located on the side of a mountain and within eight or ten feet of the bottom of the ravine aforesaid. All of the waters of said spring, when mingled and in connection with the waters produced by the melting snow and the waters of other springs situated lower down in said ravine or hollow, the court finds flow down said ravine and have been used by the defendant and her predecessors in interest for more than 35 years preceding the commencement of the action during the irrigation season of each year for the purpose of irrigating the pasture and other lands of the defendant which are located down the ravine or hollow about a mile and a half from the spring. The court further finds:

"That the waters from said 'Daniels' hollow' vary in their quantity from time to time, and at times there is more than sufficient water flowing down the said 'Daniels' hollow' to irrigate the portion of the lands of the defendant which have heretofore been irrigated therefrom and at such times of excess, the surplus waters of said 'Daniels' hollow' flow over and across the lands of the defendant into 'White river,' which is a tributary of Price river, in Carbon County, State of Utah.

• • •

"That the lands of the defendant are of a porous nature, and they require large quantities of water to irrigate them; that the seepage and drainage water from the lands of the defendant finds its way into White river, and thence into Price river, whither said lands of the defendants are irrigated from the waters of said 'Daniels' hollow' or from other sources.

"That the springs arising on the lands of plaintiff, • • • and called in this action the 'Cleary spring,' are a portion of the waters of said 'Daniels' hollow,' and the waters from

said spring were included in the appropriation of said waters by said James A. Bean, and the use of the waters from said 'Cleary spring' has been continuous and uninterrupted for the irrigation of the said lands of the defendant during the irrigation season of each and every year since the year 1878, and said use has been made by the defendant and her predecessors in interest, as the owners of said lands in said section 30, township 10 south, of range 8 east. * * *

"That the plaintiff has no rights whatsoever in or to the waters of 'Cleary spring' or 'Daniels' hollow,' but the defendant and the intervener are the owners of the right to use the whole of the waters of said 'Cleary spring' and 'Daniels' hollow' during the whole of each and every year."

Upon the foregoing and other supplementary findings the court made its conclusions of law and entered its decree in which it decreed that the defendant had the primary right to the use of the waters of said spring for the purpose of irrigating twenty-five acres of land, and permanently enjoined the plaintiff from interfering with the waters of said spring and with the defendant in using the same.

In view that we are now considering the appeal as it affects the defendant, we have only referred to the findings and decree in her favor. Counsel for appellant insists that the findings are not supported by the evidence. After a careful reading of the evidence, we are forced to the conclusion that, with the exceptions hereinafter to be noticed, the findings are not only supported by, but they accord with, the great weight of the evidence. It is not practical to set forth the evidence, and it must suffice to say that the foregoing is our conclusion as we gather it from the whole evidence. The difficulty with the findings is not that they are not supported by the evidence, but it is that in some respects they are not specific and are not responsive to the whole evidence.

For example: Both the findings and the decree are general and sweeping with respect to defendant's right to use the waters of the spring for the purpose of irrigation. That is, so far as the findings and decree are concerned, there is no limit of time fixed within which the defendant may use the waters of the spring; yet the evidence is

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beyond question that there is only a certain part of each year within which the defendant has used and can use the waters from said spring. Then again, the evidence is beyond dispute that when the hot summer months are reached the waters of said spring cease to flow in sufficient quantity to be available to the defendant, and that that condition continues until the spring of the following year when the snows begin to melt. In other words, the evidence clearly shows that during the spring and early summer months, reaching into the month of July, or later, the melting snows greatly augment the flow of water from the spring in question, and that the flow therefrom continues until late in the month of July, some witnesses put it as late as the latter part of August. The evidence, however, is quite convincing that as a general rule possibly in July, and certainly in the latter part of August in each year, the waters of the spring are not available to the defendant, for the reason that by that time the snow waters have practically all disappeared, and there is not sufficient water left to flow down the ravine or hollow. When that time arrives the water flowing from the spring disappears by evaporation and by sinking into the earth within a very short distance after it leaves the spring. It is true that the defendant contends that the waters from the spring nevertheless reach her land, which is a mile and a half farther down the hollow, by underground seepage. There are, however, two answers to that contention. The first one is that there is nothing save pure speculation to support the contention, while there is considerable evidence to the contrary; and the second answer is that the evidence is beyond all question that no water reaches the defendant's land after the last of August. While it is true that the evidence shows that there are puddles standing here and there in the bottom of the ravine, yet the evidence is conclusive that the water ceases to flow, and if there is a slight flow it does not extend back or up to the spring in question. The defendant, testifying on her own behalf, said:

"The land that we irrigate at the ranch is a black loam. It will not raise crops without irrigation. We commence using all of the water from Daniels' hollow about the 1st of

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May. We continue to use it until about the last of August."

She has stated the fact in that regard as favorable to her contention as any witness, and more favorable than some of them. There is a period of time, therefore, between the 1st day of September of one year and the 1st day of May in the following year that the defendant has not 2, 3 used, does not and cannot use, the waters of the spring for any purpose. While it is true that in her prayer, as we have seen, she claimed the waters of the spring for the entire year, yet there is not a word of evidence in support of that claim. She therefore cannot prevent the plaintiff from using the water when she cannot use it. Long on Irrigation, section 60, p. 108. As before stated, therefore, the findings of the court and the decree are too sweeping as against the plaintiff, and that is especially true with regard to the portion of the decree containing the injunction. While it is true that under both the law and the evidence the defendant has a prior and paramount right to use the water of the spring as against the plaintiff, yet she has no right to the water except as she puts it to a beneficial use. In 2 Kinney on Irrigation, etc. (2d Ed.) section 648, the law governing springs is clearly and tersely stated in the following words:

"The waters of a flowing stream may be appropriated at its source in a spring, as well as the waters of the spring itself. * * * But after the waters of a spring have passed into a stream to which the rights of prior appropriators have attached, the water cannot be taken from the spring to their injury by a later appropriator; and it is immaterial whether the water reaches the stream by percolation or seepage.

"And again, rights cannot be acquired to the waters of springs situated along the channel of a stream and naturally flowing into it, and which constitute its direct source of supply, by entering upon, cleaning out, and thereby increasing the water supply, as against prior appropriators of all of the waters of the stream. But where the spring is not a source of supply of a stream, there is no question as to the right to appropriate the waters thereof. So also one who first appropriates the waters of a spring on the public lands may continue to use such water as against one who subsequently acquires title to the land on which the spring is situated."

Under the law and the evidence, therefore, the defendant has a prior right to the use of the waters of the spring during

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the months of May, June, July, and August of each year, since during those months she applies the same to a useful purpose. After that time, however, she has no 4, 5 right to the waters of said spring for two reasons:

(1) Because she no longer uses the water; and (2) because the waters of the spring then cease to flow down to her land, and therefore are no longer available to her. Notwithstanding the fact, however, that the evidence is clearly to the foregoing effect, the court nevertheless enjoined the plaintiff from using any of the water of said spring for any purpose. In that regard, as we have shown, the findings and decree are too sweeping and are wholly unsupported by the evidence. If water were like other property to which one may acquire absolute title, then, as a matter of course, the owner has the right to prevent all interference therewith by any one, and he may do so regardless of whether he himself uses the property or not. The decree and injunction in this case seem to be based upon that theory. Such is, however, not the law with respect to the use of water. Water in this arid region is too precious to be wasted. While the prior appropriator acquires the right to use he does not obtain title to any specific water. He only acquires the right to the use of a specific quantity of water either for a limited time in each year or during the whole of the year. Although the owner has acquired a prior right to the use of water, yet if he does not use it during a portion of the year, or if he cannot make it available by reason of natural conditions like those before stated, he cannot prevent another from using the water during the period of time that he cannot use it, or make it available for use. While, under such circumstances, he retains all of his rights to the water, yet he may not insist that the water be wasted merely because he has a prior right to use it. As a matter of course, under such circumstances, the one who puts the water to a beneficial use may do so only during the time the first appropriator does not or cannot use it, and the one who then uses it may make no use thereof which will in any way affect the quantity or quality of the water during the period of time the first appropriator has the right to its use.

What, then, should the findings and judgment be in this case? Here the plaintiff brings an action for damages which he claims to have sustained by reason of the defendant's interference with his spring, which is situated entirely on his land. While the defendant denies the physical acts complained of, she also claims a prior and exclusive right to the use of the water flowing from the spring, and therefore insists that she has not interfered with any of plaintiff's rights. She also proves that the plaintiff acquired title to the land upon which the spring is situated some 30 years after she and her predecessors in interest used the waters of the spring for a useful purpose, and that he acquired the title subject to her rights, which is clearly expressed in the patent. The proof also shows that the contentions of the defendant are true, but it also shows that she has only used the water in the past (and does, and can only, use the waters flowing from the spring) for but four months of each year. The evidence is, however, clear that the spring, during the eight months of each year that she does not use the waters therefrom, nevertheless discharges a small quantity of water which can be used for culinary purposes by the plaintiff. True, the plaintiff, in seeking to make use of the waters for that purpose, undertakes to entirely exclude the defendant from making any use thereof. Now, the evidence discloses that on the 6th day of July, in the year 1916, the waters discharged from the spring amounted to about four gallons per minute. That was perhaps more than its normal flow, because the plaintiff had dug into the side of the mountain, and thereby had augmented the flow. From all the evidence it is made clear, however, that the flow from the spring for many years has been some amount (some years more, some years less), between the 1st day of September of one year and the 1st day of May in the following year. That is the period of low water, and it also is the period during which the evidence shows the defendant in the past had not used the waters, and, in consequence of the meager flow and the great distance that the spring is situated from her premises, she cannot make it available for use. The court, however, failed to make a finding in accordance with the evidence that the defendant's use of the waters

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from the spring should be limited to the four months commencing May 1st and ending September 1st of each year, and also failed to so limit her rights in the decree. In so far as the findings extend the defendant's right to use the waters from said spring during the period of time aforesaid, they are not supported by the evidence, and in so far as the decree denies the plaintiff the right of the use of waters from said spring during the whole of the year, the decree, under the circumstances, is contrary to law. As between the plaintiff and the defendant, therefore, the findings and decree as they now exist cannot be sustained. As to them, therefore, the decree should be, and it accordingly is, reversed; and the cause is remanded to the district court of Utah County, with directions to make the findings of fact conform to the evidence in the following particulars: To make findings to the effect that the defendant has a prior right to the use of all of the waters from said spring from the 1st day of May to the 1st day of September of each year, and that during said period of time the plaintiff has no right whatever in or to the waters flowing from said spring or any part thereof; that from the 1st day of September in each year to the 1st day of May in the following year the plaintiff has the right to take and use so much of the waters of said spring as he may need for household or culinary purposes in his home. The court shall also enter a decree to the effect that in using the waters from said spring the plaintiff shall in no way interfere with said spring or do any act or thing by which the surface flow thereof or the underground seepage therefrom shall be diminished in quantity or quality during the period of time commencing May 1st and ending September 1st of each year. The court is also directed to modify any other part of the findings, conclusions of law, and decree that may be necessary to make them conform to the foregoing directions. In so far as the findings, conclusions of law, and decree conform to the foregoing modifications and directions as between the plaintiff and the defendant, they are approved and affirmed.

Plaintiff's counsel, however, also assail the findings and decree upon the ground that neither the quantity of the water that the defendant may use nor the amount of the land

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that she may irrigate is definitely fixed in the findings or decree. In view, however, that the plaintiff in his complaint only claims the waters flowing from the spring, and in view that he in no event has any rights to the waters of said spring, except for the period of time and for the purpose before stated, he in no way is affected, much less prejudiced, by the matters last complained of, even though it were held that the findings and decree with respect thereto are too general, a matter on which, for the reason stated, we express no opinion.

Plaintiff, however, also vigorously assails the findings and decree in favor of the intervenor. As to the rights of the intervenor the court found:

"That the said intervenor, both by its pleadings and also by stipulation made in open court, admits that the rights of the defendant are superior to the rights of the intervenor in and to the waters of said 'Daniels' hollow,' and that, whenever the waters of said 'Daniels' hollow' are not more than sufficient to irrigate the portion of the lands of the defendant which she has heretofore irrigated from said hollow, then the defendant is entitled to turn all of the waters of said hollow upon her said lands for the beneficial irrigation thereof."

The decree follows the finding. We remark that in view of the state of the record we entertain serious doubts respecting our rights to review the assignments of error as against the intervenor. For the reason, however, that in the findings and decree all the rights of the intervenor are made subject to the rights of the defendant, and in view that during the period of time from September 1st to May 1st of the following year the intervenor never has used, nor can use, the waters from said spring, and for the reason that plaintiff's right to the use of the waters of said spring are necessarily limited, as hereinbefore stated, and hence cannot be affected by said finding or decree, we express no opinion respecting our power to review the assignments against the intervenor. If, as counsel contends, however, the decree in favor of the intervenor in so far as it can possibly affect the plaintiff is void because not supported by the pleadings, then again the plaintiff cannot legally be affected or prejudiced thereby.

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For the reasons stated, and to the extent indicated, the findings, conclusions of law, and decree are modified, and the cause is remanded to the district court of Utah County, with directions to make findings, conclusions of law, and enter a decree in conformity with the directions hereinbefore stated. Each party is required to pay his, her, or its own costs, as the case may be.

McCARTY, CORFMAN, and GIDEON, JJ., concur.
THURMAN, J., not participating, disqualified.

CLEARY v. DANIELS et al. (Price River Irr. Co.
Intervener)

No. 3062. Decided August 8, 1917. On petition for rehearing
October 5, 1917. (167 Pac. 825.)

1. WATERS AND WATER COURSES—DIVERSION—DAMAGES—SUFFICIENCY OF EVIDENCE. On counterclaim for damages from plaintiff's diversion of water, used by defendants to irrigate their lands, evidence *held* sufficient to support the findings of the jury that defendants sustained damages in the sum of \$266. (Page 508.)

On Petition for Rehearing

2. WATERS AND WATER COURSES—APPROPRIATION—DIVERSION—INSTRUCTION. The suit regarding the waters of a creek, wherein defendants claimed damages by plaintiff's diversion, an instruction that defendants were entitled to use without molestation sufficient of the waters of the creek to mature whatever crops they had growing on their land watered from the creek, so if the jury found that plaintiff interfered with defendant's use of the water by diverting it, and deprived defendants of their right to use it, defendants would be entitled to whatever damages the preponderance of the evidence showed they sustained by the diversion, did not submit any true or correct rule by which the damages could have been determined. (Page 512.)

Appeal from District Court, Fourth District; *Hon. A. B. Morgan*, Judge.

Action by Annie Cleary against Amelia Daniels and Hannah Gallagher, wherein the Price River Irr. Co. intervened.

Judgment for defendant and intervener. Plaintiff appeals.

AFFIRMED in part, and REVERSED in part and new trial ordered.

Thurman, Wedgwood & Irvine for appellant.

Booth & Booth for respondent.

M. Thomas for intervener.

GIDEON, J.

The complaint alleges that the plaintiff is the owner of a half section of land located in Utah County, and that such lands are barren without irrigation, but productive with irrigation; that to obtain water to irrigate said lands plaintiff made application to the state engineer to appropriate 2.3 cubic feet per second of the waters flowing in an unnamed creek near said lands; that under that application she became the owner, and is the owner, of that amount of water in said creek from April 1st to October 31st of each year; that on the 22d day of June, 1915, and prior thereto, defendants wrongfully placed a dam in said stream and diverted the waters from plaintiff's flume and ditch, and turned the same back into the natural channel of the creek, and plaintiff has, by reason thereof, sustained damages by loss of crops. Plaintiff asks for injunctive relief and for damages.

Defendant's answer admits the filing of the application by the plaintiff in the state engineer's office, denies plaintiff's rights to any portion of the waters of said creek, and denies any damages to plaintiff by any act of defendants. Defendants affirmatively allege as a counterclaim against the plaintiff that they are the owners of 200 acres of land located at or near the outlet of the canyon through which said creek runs, and that the same is barren without irrigation, but will produce valuable crops with irrigation, and that they and their predecessors in interest have continuously used all of the waters of said creek to irrigate the lands now owned by the defendants for more than thirty years last past, and that the same has been used for the purpose of irrigating said lands, on which hay and other crops have been grown;

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that the plaintiff, in the month of June, 1915, and at various other times, diverted the waters from the natural channel of said stream and turned the same upon plaintiff's lands against the rights of the defendants, and that by reason thereof defendants have suffered damages. Defendants ask for a decree that they are the owners of the right to the use of the waters of said creek for irrigation and watering of stock during the entire year, that plaintiff be enjoined from interfering with such use, and for damages.

The reply admits that plaintiff diverted the waters at the point mentioned in the complaint; alleges that she had the right so to do; denies that the defendants have the right or title to the use of said waters, and denies all other allegations of defendants' answer.

The Price River Irrigation Company filed a complaint in intervention in which it claimed all the waters flowing in said stream, and pleaded two decrees theretofore entered by a court of competent jurisdiction by virtue of which it claimed the right to the use of said waters.

A jury was impaneled to determine the question of damages. The other issues were determined by the court.

The litigation here involves the right to the use of the waters of a small creek running through and out of what is known in the testimony as Hunter's or South canyon. The lands of the defendants lie at the mouth or opening of this canyon, and the canyon extends westerly about three or four miles into the mountains and near what is known as Soldier Summit. The stream in this canyon is fed from springs near its head and along its course and by melting snows in the spring and early summer. During the melting of the snow there is much more water in the stream than at any other season of the year. The plaintiff's lands are located near this stream a mile or more above the lands of the defendants, and are so located that the waters can be diverted from the stream by means of flumes and ditches so as to be taken upon the lands of the plaintiff. The jury returned a verdict assessing the defendants' damages in the sum of \$266, and the court made findings and conclusions in favor of the defendants and against the plaintiff, and awarded the defendants the

right to the use of sufficient of the water of said creek to irrigate twenty-five acres of land, and decreed all the remainder or surplus waters to belong to the intervener, the Price River Irrigation Company, and that the plaintiff had no right to the use of the waters of said stream. The court enjoined plaintiff from in any way interfering with or diverting any of the waters of said Hunter's canyon, also known as South canyon, or to interfere with the use of the same by the defendants or intervener. The defendants and intervener are decreed to have the right to have said waters flow down said canyon unobstructed to the lands of the defendants and to White river, a tributary of Price river.

From that judgment plaintiff appeals. The principal contention of the plaintiff is that the findings of the court and its judgment are not supported by the 1 testimony.

The court, among other things, made the following findings:

“(5) That there is a natural stream of water rising in and running down a certain hollow or canyon lying to the west of the lands of the defendant, said hollow or canyon having been designated in this action as ‘South canyon’ or ‘Hunter’s canyon.’

“(6) That in the year 1878 one James A. Bean, being then the owner of a squatter's right in and to the said lands of the defendants, was using the same for a pasture; and while so using the said lands for a pasture made ditches and canals leading from the stream flowing then down said ‘Hunter’s canyon,’ and conducted the waters therefrom onto a portion of the said lands of the defendants, and used the said water for the purpose of irrigating the said lands and causing the grass and other vegetation then growing on said lands to grow and increase in growth.”

In its seventh finding the court traced the chain of title or use from the ownership of James A. Bean to the defendants, and concerning the amount of water that the defendants are entitled to use makes the following finding:

“That the said lands of the defendants are of a porous nature, and they require large quantities of water to irrigate them; that the duty of water upon said land when there is

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a large stream flowing thereon is 70 acres to the second foot of continuous flow of water, but when the water flowing in said canyon is not to exceed one cubic foot of water per second, then the duty of water upon the defendants' lands is not to exceed 25 acres to the second foot; that the seepage and drainage water from the lands of the defendants finds its way into said White river and thence into Price river; that each and all of the allegations of the defendants' counter-claim are true."

The court also found:

"That the intervener is the owner of the right to the use of all the waters of said Hunter's canyon which are not necessary for the use of the defendants; that the said rights of the intervener were acquired by prior appropriation and use for beneficial purposes, and are superior to any and all rights of plaintiff to said waters; that the plaintiff has no rights whatsoever in or to any portion of the waters of said Hunter's canyon, but the defendants and the intervener are the owners of the right to use the whole of the waters of said Hunter's canyon during the whole of each and every year; that the allegations of the complaint in intervention are all true."

There is not only substantial evidence to support the findings of the court so far as the rights of the defendants are concerned in and to the use of the waters, but its findings are supported by practically all of the testimony taken during the trial. The decree follows the findings and is supported by them.

This is a mountain stream, and, except during the spring and early summer months, has very little, if any, water flowing in it. The testimony is that from the latter part of June and on during the remainder of the year, in fact up till the beginning of the melting of the snow in the following year, there is not the amount of water running down this canyon that has been awarded and given to the defendants. The decree awards to the defendants only such amounts as are named in the court's findings as necessary to irrigate their lands.

This is a companion case to *M. J. Cleary v. Daniels*, 50 Utah, 494, 167 Pac. 820, decided at this term. The assignments

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of error directed against the judgment in favor of the intervener there are identical with those directed against the judgment in favor of the intervener here. The remarks of Mr. Chief Justice Frick made in the opinion in that case with reference to the rights of the plaintiff as against the intervener are applicable to the state of the record in this case, and are therefore adopted and applied to this case.

Complaint is also made that the findings of the jury are not supported by any testimony. The testimony of Amelia Daniels is that the defendants have been accustomed to harvest from this particular land from forty to fifty tons of hay each year; that in the year 1915 they had only about one-third of a crop of hay, and that the cause of the poor crop was want of sufficient water to irrigate the land; that the shortage of water was due to interference with the natural flow of the stream by the plaintiff; that hay in the year 1915, in that locality, was worth \$16 per ton. There is other testimony in a measure going to show that the defendants did sustain damages, and, in our judgment, it is sufficient to support the findings of the jury.

We are satisfied from an examination of the record that findings, so far as the defendants are concerned, are amply supported. It follows that the judgment of the lower court should be affirmed. Such is the order; appellant to pay costs on appeal.

FRICK, C. J., and McCARTY and CORFMAN, JJ., concur. THURMAN, J., not participating, disqualified.

ON PETITION FOR REHEARING

GIDEON, J.

Appellant has filed a petition for rehearing in which it is strenuously insisted that the instruction given to the jury at the trial in the lower court respecting damages to which the respondent Amelia Daniels is entitled, by reason of the plaintiff having diverted part of the waters of the stream in question during the summer of 1915, is erroneous and did not give to the jury any correct rule by which to estimate such dam-

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ages, if any were sustained by such respondent. The instruction complained of is as follows:

“You are instructed that as a matter of law the defendants were entitled to use, without molestation from the plaintiff, sufficient of the waters of said South canyon or Hunter’s canyon to mature whatever crops the defendants had growing on their land situated near the mouth of said canyon, which had been and were being watered from the stream flowing out of said South canyon or Hunter’s canyon. So, if you find from the preponderance of the evidence in this case that the plaintiff interfered with defendants’ use of said water, as heretofore defined, by diverting the water of said canyon away from the defendants, and deprived the defendants of their right to use the same, then the defendants would be entitled to whatever damages the preponderance of the evidence shows they have sustained on account of plaintiff’s said diversion of said water.”

The objections to that instruction and the assignment of error respecting it are not so much as to what it includes but as to what is omitted therefrom. The court failed to instruct the jury what quantity of water respondent was entitled to use or to advise the jury as to the correct, or any, rule to guide it in arriving at the net value of the crops lost, or by what method it (the jury) should or could fix the real damages, if any, sustained by the respondent. There is no testimony in the record as to the cost of labor necessary to harvest and market the hay or as to the cost of harvesting and stacking the hay upon the premises. Neither is there any testimony as to the cost of cultivating and irrigating the land on which the crops were grown. In the absence of some proof as to these facts, there was nothing before the court or jury by which the actual damages sustained by respondent could be determined. Had there been testimony proving, or tending to prove, such facts, instructions should have been given advising the jury to consider the same in determining the loss to respondent by failure of her crops to mature if such failure was the result of the wrongful taking by appellant of water to which she, the respondent, was entitled.

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Our attention being more particularly directed to the question of the ownership of the water involved, this particular assignment of error was not given the attention it should have been given in the original opinion. We 2 are now satisfied, for the reasons indicated, that the instruction did not submit to the jury any true or correct rule by which the damages, if any, could have been determined.

The former order of this court is modified to read as follows: The judgment of the lower court is affirmed so far as the ownership and use of the water of the creek in question is concerned, but that part of the judgment awarding defendant Daniels damages against the plaintiff is reversed, and, as to that, a new trial is granted. Neither party to recover costs on this appeal. Rehearing denied.

FRICK, C. J., and McCARTY and CORFMAN, JJ., concur. THURMAN, J., not participating, disqualified.

PARROTT BROS. VO. v. OGDEN CITY

No. 3045. Decided June 27, 1917. Rehearing denied October 5, 1917. (167 Pac. 807.)

1. **JUDGMENT—CONCLUSIONS OF LAW AND FINDINGS.** Where, had the court rendered judgment in accordance with its findings, the judgment for plaintiff would have been for \$1,742.98, rather than for \$671.50, with interest, for which judgment was rendered, the court's conclusions of law, palpably at variance with the findings, and its failure to render judgment in accordance with its findings were error; the conclusions of law must be predicated upon and find their support in the findings, and the judgment must follow the conclusions of law. (Page 514.)
2. **APPEAL AND ERROR—VARIANCE BETWEEN FINDINGS AND CONCLUSIONS OF LAW—DISPOSITION OF CASE.** Where the conclusions of law are palpably at variance with the findings as to the amount of plaintiff's recovery, the Supreme Court, on plaintiff's appeal, will order the lower court to set aside its erroneous conclusions of law and to substitute conclusions entitling plaintiff to a judgment in accordance with the express findings of fact, also to enter such judgment. (Page 514.)

Appeal from Weber County, Second District

Appeal from District Court, Second District; *Hon. J. A. Howell*, Judge.

Suit by Parrott Bros. Company, a corporation, against Ogden City, a municipal corporation.

Judgment for plaintiff. Plaintiff appeals.

CAUSE REMANDED with instructions to amend conclusions of law and judgment.

C. R. Hollingsworth and *Wade M. Johnson* for appellant.

E. T. Hulaniski and *J. C. Littlefield* for respondent.

CORFMAN, J.

Plaintiff brought suit in the district court of Weber County to recover of the defendant \$1,775.78 on a verified claim for work and materials alleged to have been furnished in the construction of street pavement under contract. Trial was had before the court without a jury, whereupon the court, after hearing the testimony, made its findings of fact, conclusions of law, and rendered judgment against the defendant in plaintiff's favor for the sum of \$671.58, together with interest and costs of suit. Plaintiff appeals.

The appellant assails the conclusions of law and the judgment of the trial court upon the ground that they were not predicated upon the court's findings of fact; and this question is the only one raised on the appeal and now properly before this court for determination.

The findings in question, so far as material here, are as follows:

"That this plaintiff assumed the obligations and liabilities of said contract, relying upon the stipulations of said contract that the above work provided for therein and the above material required to be furnished, as therein provided, was in fact to be done and furnished and paid for by the defendant, and said defendant knew that this plaintiff entered upon said contract and agreed to do the said work and furnish the material therein provided in reliance upon the terms and

provisions thereof, hereinbefore mentioned; that after said plaintiff had entered upon said work the defendant refused to permit plaintiff to construct said 50 cubic yards of concrete waterways, and to furnish and put in place said material above mentioned, or any portion thereof, and thereby deprived plaintiff of the profits, which would have amounted to the sum of \$880, accruing, or which would have accrued to it, from doing said work and furnishing said material, to its damage in the sum of \$880, no part of which has been paid.

"That the said contract, with specifications thereto attached and made a part thereof, provided that all contraction and expansion joints should be filled with asphaltum cement. That after entering upon said work, plaintiff was, by the defendant, directed and required to and did, in lieu of the asphaltum cement for said contraction and expansion joints as provided for in said contract, purchase, obtain, and use 7,656 feet of expansion felt, at an expense to the plaintiff in the sum of \$382.80, and to plaintiff's damage in said sum of \$382.80, no part of which has been paid. That the defendant in its answer admits that there is due from it to the plaintiff the sum of \$191.40 of said sum of \$382.80."

As to the first finding above, the conclusion of law by the court was:

"That the plaintiff is not entitled to recover judgment against the defendant for its loss of profits in the sum of \$880 for and on account of the defendant refusing to permit the plaintiff to do the work and furnish the material as set forth in the fourth finding of fact."

As to the second finding above, the conclusion of law reached by the court was:

"That the plaintiff is entitled to recover judgment against the defendant for the sum of \$191.40 only, for the tarred felt placed in the expansion and contraction joints of said concrete pavement, as set forth in the sixth finding of fact."

The record clearly shows that, had the court rendered its judgment in accordance with its findings above set forth, the judgment for the appellant would have been for \$1,742.98 rather than for \$671.58, with interest from August 5, 1914; and appellant assigns to be, and now contends 1,2

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that the court's conclusions of law and failure to render judgment in accordance with its findings of fact were error. We must agree with this contention. It is fundamental that the conclusions of law must be predicated upon and find their support in the findings of fact, and the judgment must follow the conclusions of law; and where, as here, the conclusions of law are so palpably at variance with the findings, there is no alternative but to order and require the lower court to set aside its erroneous conclusions of law and substitute conclusions that will entitle the appellant to, and enter, a judgment in accordance with its express findings of fact.

It is therefore ordered that this cause be remanded to the district court of Weber County, with instructions that the conclusions of law and judgment be amended in conformity with the views and findings of this court herein expressed. Costs to appellant.

FRICK, C. J., and McCARTY and THURMAN, JJ., concur.

GIDEON, J., being disqualified, took no part in the consideration of the foregoing opinion.

JENSEN v. ANDERSON

No. 3043. Decided July 10, 1917. Rehearing denied October 6, 1917. (167 Pac. 811.)

1. LANDLORD AND TENANT—RENTING ON SHARES—ACTIONS—PLEADING. In an action instituted August 6th, the complaint alleged an oral agreement between plaintiff and his tenant for the division of a crop of wheat; that defendant on the 5th and 6th days of August threshed 2,382½ bushels of wheat; that as it was threshed plaintiff was the owner and entitled to the immediate possession of one-fourth thereof; that on such days he demanded one-fourth of the grain which was all similar in kind and capable of division; that defendant wrongfully obtained possession thereof, and unlawfully continued in possession, and wrongfully detained the grain; that before the commencement of the action, and on August 5th and 6th plaintiff demanded 596 bushels, or one-fourth of the crop; and that defendant unlawfully withheld and detained all of the crop. *Held*, that the

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complaint sufficiently showed plaintiff's right to and immediate possession of the property at the time of the institution of the action. (Page 518.)

2. EVIDENCE—PAROL EVIDENCE—SUBSEQUENT AGREEMENTS. Where a lease provided as to the years 1912 to 1916, inclusive, that the lessee should plow and crop the whole farm every alternate year, that he should have the whole of the first and second crops harvested in the years 1912 and 1914, and that out of the third crop to be grown and harvested in 1916 he should pay a rental equal to one-fourth of the crop, proof of a subsequent parol agreement that a crop should be grown in 1915, and divided between the parties, did not vary or contradict the terms of the written lease, but was an additional agreement respecting a crop not contemplated by the lease. (Page 519.)
3. LANDLORD AND TENANT—RENTING ON SHARES—LEASE—CONSIDERATION FOR MODIFICATION. If any consideration for such parol contract other than the mutual promises of the parties was required, the right given the tenant to cultivate the premises and harvest the crop during 1915 constituted a consideration therefor. (Page 519.)
4. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS. O. leased a farm to defendant to be plowed and cropped every alternate year, the first two crops to belong to defendant and the third, to be grown and harvested in 1916, to be divided. O. sold the farm to plaintiff, and plaintiff sued for possession of a part of a crop grown in 1915, asserting a parol contract for the raising of such crop and a division thereof. The court charged that the jury were to determine the action under the terms of the lease, and that if they found that its terms were ambiguous, then the construction as placed thereon by plaintiff and defendant was to control. *Held*, that while this instruction may have been outside the issues, it was not prejudicial error, where practically all the testimony bore on the question of whether there was such a parol agreement as plaintiff alleged, there was sufficient evidence on this point to support a verdict for plaintiff, and the court further charged that the jury's duty was to determine the ownership of one-fourth of the crop harvested in 1915, and that if they found such ownership to be in plaintiff, their verdict should be for him. (Page 520.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Jacob Jensen against P. M. Anderson.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Appeal from Box Elder County, First District

Geo. Halverson for appellant.

W. J. Lowe and *B. C. Call* for respondent.

GIDEON, J.

This is an action instituted by the plaintiff to recover from the defendant 596 bushels of wheat, or the value thereof, alleged to be \$540. The complaint alleges that one O. J. Olson was the owner of 81 acres of land in Box Elder County in April, 1911; that thereafter, on or about the 16th day of January, 1914, Olson sold and conveyed said premises to the plaintiff, Jacob Jensen; that on April 1, 1911, Olson leased the premises to the defendant, P. M. Anderson, for a term of 5 years and 6 months, making the lease terminate on October 1, 1916. The agreement of the parties, as contained in said lease, is as follows:

"O. J. Olson agrees to furnish material and fence said tract of land during the autumn of 1911. P. M. Anderson agrees to plow, clear and burn all brush, cultivate, furnish all seed, and seeding the whole tract of land during the year 1911. It is also agreed that P. M. Anderson shall pay no part or portion to O. J. Olson of the first and second crops respectively that will be harvested in the years 1912 and 1914, while out of the third crop, which will be grown and harvested in the year 1916, P. M. Anderson shall pay a rental to O. J. Olson, the amount of equal to one-fourth of the whole crop grown and harvested and threshed from said land, said one-fourth shall be clear and free of all expenses. Mr. P. M. Anderson agrees to plow and crop the whole tract of eighty-one acres every alternate year during the term of this lease as given above."

It is alleged in the complaint that subsequent to the conveyance to the plaintiff an oral agreement was entered into between the plaintiff and the defendant, whereby the defendant agreed to farm and cultivate the premises for the season of 1915, and give the plaintiff one-fourth of the crop harvested thereon during that year; that during the summer of 1915 the defendant harvested the crop growing upon the land,

and on the 5th and 6th days of August, 1915, threshed 2,383½ bushels of wheat; that the plaintiff was the owner and entitled to the immediate possession of one-fourth of the said grain, and on both the 5th and 6th days of August, 1915, demanded from the plaintiff one-fourth of the amount of wheat threshed, and further alleged that as the grain was threshed the defendant wantonly, wrongfully, and unlawfully obtained possession of the same against the will and consent of plaintiff, and has continued since said dates to wrongfully and unlawfully retain possession of the same from the plaintiff against plaintiff's will. A general demurrer was filed to that complaint on the ground that it does not state facts sufficient to constitute a cause of action. After overruling the demurrer an answer was filed, admitting the execution of the lease, the ownership of the land in Olson at that time, and the subsequent transfer of the same to the plaintiff herein, and denying all other allegations of the complaint. A trial was had to a jury, which resulted in a verdict for the plaintiff, awarding him possession of the wheat.

Appellant first attacks the sufficiency of the complaint, and it is contended that as this is a suit for the recovery of personal property, the complaint fails to show a right in plaintiff to the immediate possession of the property 1 upon the date of instituting the action. The original complaint was filed August 6, 1915. The allegations in the second amended complaint, upon which the issues were tried, among others, are as follows:

"That during the summer of 1915, the said defendant harvested the crops growing upon said premises, and on the 5th and 6th days of August, 1915, threshed 2,383½ bushels of wheat from said grain grown upon said premises.

"That as said grain was threshed, the plaintiff was the owner of and entitled to the immediate possession of one-fourth thereof, and that on the said 5th and 6th days of August, 1915, the plaintiff demanded of the defendant one-fourth of said grain, which was all similar in kind and capable of division.

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"That as said grain was threshed, as aforesaid, the defendant wantonly, wrongfully, and unlawfully obtained possession of said wheat, and all thereof, without the plaintiff's consent, and now, and at all times since said taking, wrongfully and unlawfully continues in the possession of said grain, and wrongfully detains the same from plaintiff, against plaintiff's will and without his consent.

"That before the commencement of this action, to wit, on the 5th and 6th days of August, 1915, and while the defendant was in the possession of all of said wheat, the plaintiff demanded of the defendant possession of 596 bushels of said wheat, or one-fourth of the total amount of said crop.

"That said defendant still unlawfully and wantonly withholds and detains all of said crop, including plaintiff's one-fourth thereof, from the possession of the plaintiff, to his damage in the sum of \$540."

The allegations of ownership and right of possession in plaintiff, together with the further allegation that the possession is unlawfully continued on the part of the defendant, are equivalent to, and contain, at least, by necessary inference or deduction, an allegation that the plaintiff was entitled to the immediate possession of the property at the time of instituting the suit. In addition it is alleged specifically that a demand was made for the possession of the property, and possession refused on the 6th day of August, and on that day the complaint was filed. I do not see how an allegation more specifically showing a right in plaintiff to the immediate possession of the property upon the date of instituting the action could have been made. *Smith v. Wisconsin Inv. Co.*, 114 Wis. 151, 89 N. W. 831.

Objection is further made that testimony was permitted to be introduced violating the terms of a written agreement; that the lease in question covered a period of five years, and that any testimony showing an agreement between the plaintiff and defendant in July, 1914, relating to the 2, 3 crop to be grown upon the premises in 1915, was contradictory of and varied the terms of a written instrument. An examination of the lease, as hereinbefore set out, will show that it was never in the contemplation of the original

parties to that agreement that a crop should be grown upon the premises during the year 1915. It seems to have been the intention that a crop should be grown each alternative year, and that the lessee, the defendant, was entitled to the full harvest for the years 1912 and 1914, and that the "third crop" to be grown thereon in the year 1916 should be divided, one-fourth to the landowner and three-fourths to the tenant. Nothing is said in the lease about a crop on the premises in 1915, and any agreement made between plaintiff and defendant in July, 1914, respecting the crop of 1915 was not in any way at variance with or contradictory of the terms of a written agreement. In fact, it was simply an additional agreement respecting a crop to be grown in a year not contemplated by the original parties to the lease. The consideration for the parol contract, if any consideration was required save the mutual promises of the parties, was the right that the tenant was given to cultivate the premises and harvest a crop during 1915. 24 Cyc. 813.

Complaint is also made of this instruction given by the court:

"You are instructed that, under the terms of the lease entered into between O. J. Olson and the defendant, the defendant was entitled to two crops, and as to the third crop, Olson was to have an interest therein, as in 4 the said lease provided. You are to determine this action under the terms of the lease, and if you find that the terms thereof are ambiguous, then the construction as placed thereon by the plaintiff and the defendant is to control."

Objection is made that that instruction was outside the issues, and "that it submitted to the jury the whole case upon the lease from Olson to the appellant, and left it (the jury) to determine whether, under the terms of the lease, respondent was entitled to recover," and that by so doing the court ignored the issues made by the complaint and answer. It may be doubted whether the question therein submitted to the jury was within the issues, but the court proceeded in the next instruction (No. 5) to tell the jury that their duty was to determine the ownership of the 596 bushels

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of wheat, being one-fourth of the crop harvested in 1915 upon the land described in the complaint, and that if they found that ownership to be in plaintiff their verdict should be for plaintiff and against defendant. An examination of the record shows that practically all the testimony introduced bore directly on the one issue as to whether there was an agreement made between plaintiff and defendant in July, 1914, respecting the division of the crop to be harvested on the premises in the year 1915, and that issue was the one considered and determined by the jury. It will not be contended that, unless errors in law were made in the submission of the question to the jury, there is not sufficient evidence in the record to support the verdict. In fact an examination of the entire record shows that the great preponderance of the testimony does support the allegations in the complaint that such a contract was made, and that fact is not disputed by any witness except the appellant himself.

There appears to be no prejudicial error in the record, and the judgment is therefore affirmed. Respondent to recover costs.

FRICK, C. J., and McCARTY, CORFMAN, and THURMAN, JJ., concur.

OLSEN v. TRIANGLE MINING CO.

No. 2979. Decided April 27, 1917. Rehearing denied October 6, 1917. (167 Pac. 813.)

1. **PLEADING—MATTERS IN ISSUE UNDER PLEADINGS—IMMATERIAL EVIDENCE.** While it was not material whether defendant was an owner of the mining property where plaintiff was rendering services at the time of the accident, where ownership was alleged by plaintiff and denied by defendant the court did not err in allowing defendant to show that its interest in the property was a leasehold. (Page 527.)
2. **MASTER AND SERVANT—HAZARDOUS UNDERTAKINGS—DUTY TO WARN.** If plaintiff was not skilled in the use of powder in blasting, he should have informed defendant mining company thereof, as it had the right to assume that plaintiff in offering his services had sufficient knowledge and skill. (Page 528.)
3. **MASTER AND SERVANT—RULES—HAZARDOUS UNDERTAKINGS.** A master is not justified in conducting a hazardous and complicated

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business without some system of rules and regulations calculated to lessen the risks his servants will necessarily incur while engaged in their employment. (Page 528.)

4. **MASTER AND SERVANT—RULES—HAZARDOUS UNDERTAKINGS.** The rule that a master is not justified in conducting a hazardous business without some system of regulations is not applicable where a servant sufficiently matured in years, experienced, and competent is engaged in the performance of all the duties attending the work. (Page 528.)
5. **MASTER AND SERVANT—ACTION FOR INJURY—EVIDENCE—SUFFICIENCY.** In an action by an employee for injuries sustained while engaged in blasting, *held* under evidence that the promulgation of rules by the master would not have avoided the accident. (Page 529.)
6. **MASTER AND SERVANT—DUTY TO PROMULGATE RULES—NEGLIGENCE.** In the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them.¹ (Page 529.)
7. **MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.** In an action for injuries due to the explosion of a blast, *held* that plaintiff failed to do the things and take the precautions for himself that miners generally do while engaged in their work. (Page 530.)
8. **MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** In an action by a mining employee for injuries due to the explosion of a blasting charge, evidence *held* insufficient to show negligence of the employer contributing to the injury complained of. (Page 530.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Victor Olsen against the Triangle Mining Co., a corporation.

Judgment for defendant. Plaintiff appeals.

AFFIRMED with costs to respondent.

M. E. Wilson and *J. C. Wood* for appellant.

King, Nibley and Farnsworth for respondent.

CORFMAN, J.

¹*Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90; *Stone, Adm'r. v. Union Pac. R. Co.*, 35 Utah, 305, 100 Pac. 362.

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This was an action brought by plaintiff against the defendant to recover damages for personal injuries alleged to have been sustained by him while in the employ of the defendant. In substance, the allegations of the complaint are: That the defendant, Triangle Mining Company, is a corporation engaged in working a mine at or near Alta, Salt Lake County, Utah, and that on the 19th day of August, 1915, plaintiff was in the employ of the defendant working as a miner in one of the underground workings of its mine; that at said time plaintiff was twenty-one years of age, inexperienced in the use of powder for blasting rock in mines, and unacquainted with and did not appreciate the dangers incident thereto; that he did not know the kinds or quality of powder; that defendant knew or might have known by ordinary care, of plaintiff's age and inexperience concerning powder and the dangers attending the use of the same; that on the said 19th day of August an explosion occurred in defendant's mine destroying one of plaintiff's eyes and otherwise injuring him; that said explosion was occasioned by reason of the negligence of defendant in failing to adopt a safe system in carrying on its work of blasting, in failing to use powder of recent manufacture, in using old rotten powder that would not readily explode unless struck with a pick or other instrumentality, in failing to furnish plaintiff with a reasonably safe place in which to do his work, and in failing to properly instruct him concerning the dangers incident to his employment. The answer admits the employment of plaintiff as a miner, and that he suffered injury to one of his eyes; denies the other allegations of the complaint; and pleads affirmatively that the injuries complained of were the result of plaintiff's own negligence and that he voluntarily assumed the risk of injury. The trial was to a jury, resulting in a verdict, "no cause of action," on which judgment was entered. Plaintiff appeals.

Numerous errors are assigned on appeal, but we will here discuss only such as are urged and apparently relied upon, by plaintiff for reversal, viz. error in the admission of testimony during the trial, prejudicial remarks of the trial court

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in the presence of the jury, errors of the trial court in giving of certain instructions, and errors of the trial court in refusing to give certain instructions requested by plaintiff.

Preliminary to his several contentions for a reversal of the judgment and his discussion in detail of the errors assigned by plaintiff in his brief, counsel for plaintiff contends that evidence was given at the trial in support of the allegations of the complaint, as follows:

"To support the allegations of the complaint the plaintiff offered evidence tending to show his inexperience; tending to show that the defendant operated its mine without any system or rule in regard to blasting; that it used old powder which would not readily explode, and that the place was unsafe by reason of this lack of system and want of inspection on the part of defendant; that no rule was adopted by the defendant requiring a count to be kept of the number of charges inserted and the number of charges exploded; that the defendant permitted and caused another of its servants to work in close proximity to the plaintiff and permitted the charges inserted by the plaintiff and the other servant to be exploded so that no count could be and so that the plaintiff could not ascertain whether all of the charges which he had inserted had exploded or not.

"As to the powder, evidence was offered to show that sticks of giant powder of a manufacture of 1910 were furnished by the defendant to the plaintiff, and that he was required to use the same."

In the consideration of many of the errors assigned by plaintiff, we will have occasion to advert to the evidence of the plaintiff and his witnesses; and at the outset we will set forth some of plaintiff's evidence bearing on the issues as disclosed by the record.

The plaintiff testified at the trial that he was twenty-two years of age on the 16th day of November, 1916; born in Finland, came direct to Utah, about May 22, 1913; had never worked in mines before; started mucking in the Horn Silver mine at Frisco; worked there three months, mucking all the time; went from there to Eureka; worked there for the Yankee Mining Company about nine months as a mucker;

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also worked for the Little Chief Mining Company about fifteen days; went from there to Alta and was there over a year; worked as a mucker and mined about three weeks; from there went to the Cardiff mine; was mucking there, and mined for a while; then went to the Triangle Mining Company about July 28, 1915, and worked there as a miner:

"I had used some powder; when I began to use powder they told me not to tamp the holes hard as they would explode as I was loading. I have heard men say, 'If you drill into a missed hole it will explode.' Have never used powder, except as stated here when I was mining. I applied to the foreman, Gus Wilson, for a job. He showed me the place and told me to start in and work there in the face of the drift. He said, 'You pick this loose here and muck it back a little, and get some powder in the blacksmith shop, and drill some holes and blast it,' but did not say anything more. I drilled the holes, put in the powder and blasted. Used to get the powder in the morning. The box was close beside the hoisting machine there in the storeroom. It was the only box there. The box looked like a new box. Never paid any attention whether the sticks were old or new. John Nube worked there a few days. We shot once a day, at the end of the day. When I was alone I did not keep account when the shots went off. Both got powder that day out of the storeroom out of this box mentioned. He had about the same number of holes I had. They were discharged at the same time. We could not count the explosions. They all went together; that is, his shots and mine. We came back next morning. I started to pick down. I could not see any missed hole. Had only struck with the pick once or twice before I saw a light and the explosion followed. At the Yankee mine, I saw the face of the drift where the miners were working hundreds of times; saw the miners put in holes and load the holes; put in the fuse and caps; saw those a great many times. When a man has a long way to go, he uses a long fuse. Sometimes I saw the miners putting in holes and firing them. When I was working in the Cardiff, I had some partners, and I learned a little how to load holes. When I came on shift, I examined the top of the raise to see how the holes had broke. I didn't make a careful examina-

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tion of the top of the raise. I knew a little about a missed hole or a missed shot when I went to work in this raise. When I went to work for the Triangle Mining Company, I didn't know anything about it. All I heard was a fellow told me before it was dangerous to drill into a missed hole. Mr. Wilson, the foreman, never asked me at any time whether I was a miner. Nothing was said between me and Wilson about my experience as a miner. When I was alone I always counted the shots. I didn't notice anything the matter with the powder I used. I didn't have any trouble with it. It had exploded all right before. It must have been a missed hole that I picked into."

Leonard G. Hardy, a witness for the plaintiff, testified:

"It is customary, when you have loaded seven or eight holes, for an experienced miner to keep track of the number of explosions heard so that he will know if there is any holes that miss fire. When one miner is working at the face, and another miner twenty or thirty feet back, both charging holes, they will arrange for one to shoot a little ahead of the other, using the longer fuse for the first shots, then shorter, so as to give them both time to get out of the way. The procedure of a miner always counting his shots to see if he hears an explosion from each of his charges of powder is one that is universally followed by miners; it is thoroughly well known and is recognized by all miners. Even though one hears as many explosions as he had charged holes, there still may be a missed hole. One cannot be entirely safe unless he thoroughly examines each of the places where he has put in charges of powder. It is a miner's duty, when he comes on shift the following morning, to make careful and thorough examination of the places where each one of his holes has been drilled and the powder inserted. There is no way in which the danger of injury can be obviated except a careful observation by the miner himself of the place where he put in the holes."

Peter Cloonan, a witness for plaintiff, testified:

"There is a general practice among miners to count holes. Where two or more are working together, drilling holes, when we get through drilling we light our holes at the same time,

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and go to a place of safety and get these reports; that is when the counting is done. As a rule when you do not get the full reports you should be more careful. Still, at the same time, they might all have exploded. Not knowing whether they have all exploded or not, the only way that he can be protected is for him to get down there and carefully examine each of the places where the holes have been inserted. The danger that there may be missed holes is well known to everybody that works around a mine."

It is first contended by plaintiff that the court erred in permitting defendant to show, over the objection of the plaintiff, that it did not own the mine, but was working it under lease when the accident in question occurred. Ownership in the defendant was alleged by plaintiff in his complaint 1 and denied in the answer of defendant. While we do not deem it very material as to whether the defendant was an owner of or merely held a leasehold interest in the mining property where plaintiff was rendering services to the defendant at the time of the accident in question, yet, ownership having been alleged in the complaint and denied in the answer, we think the defendant was clearly entitled to show that its interest in the property was a leasehold interest only; and the trial court did not commit error in receiving the defendant's evidence tending to prove the fact.

It is contended that the trial judge made unnecessary and prejudicial statements at the trial in the presence of the jury, and that plaintiff's counsel was unduly restricted in the cross-examination of Mr. Hurley, a witness for the defendant. The record does not disclose the purpose of plaintiff's counsel, nor the character of the evidence he was seeking for on cross-examination of the witness. The remarks of the court indicated it was with reference to a collateral matter. We think counsel would have had very little to complain of had he more readily acquiesced in the ruling of the court.

There is nothing presented in this assignment to warrant this court in reversing the judgment.

Many errors are assigned and relied on by the plaintiff in the giving and refusal to give to the jury of certain instructions by the trial court. We have carefully reviewed these

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assignments of error and the trial court's instructions given to the jury, and, after doing so, we are convinced that the court in its instructions to the jury stated the issues in fairness and without any prejudicial error to the plaintiff. In view of the evidence disclosed by the record, it would subserve no good purpose to here enter into a detailed discussion of these assignments of error.

According to plaintiff's own testimony, when he engaged his services to the defendant, he was of full age; for more than two years immediately previous he had been employed in and about various mines. Not only had he seen others at work, drilling and blasting rock with powder, but he too had worked as a miner sufficiently long for his own experiences to have taught him the dangers attending the use of powder for blasting, as we think the record conclusively shows. If he was not skilled in the use of powder in blasting, if he was incapable of appreciating the dangers attending its use, in offering his services to the defendant he should have apprised it of his lack of knowledge and inability to do that which, as the record here shows, miners generally are called upon to do in the performance of their duties while engaged in the work of mining for their employers. The defendant had the right to assume, when plaintiff offered his services to it, that he had sufficient knowledge and skill to properly discharge the duties he was attempting to perform at the time the accident in question occurred. *Union Pac. Ry. Co. v. Estes*, 37 Kan. 715, 16 Pac. 131; *Sunney v. Holt, etc.* (Ohio C. C.) 15 Fed. 880; *Huber v. Jackson & Sharp Co.*, 1 Marvel's (Del.) 374, 41 Atl. 92; *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Whittaker v. Coombs*, 14 Ill. App. 498; *Wharton v. Tacoma Fir Door Co.*, 58 Wash. 124, 107 Pac. 1057. 2

It is contended by plaintiff that defendant operated its mines without any system for the carrying on of its work; that it failed to promulgate rules and regulations for the government and direction of its employees while engaged in drilling and charging holes with powder, and exploding charged holes. True, in the case at bar, no 3, 4

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rules had been promulgated by defendant calculated to guard against accidents in the work plaintiff was engaged in doing—a work necessarily hazardous and attended with great risk. It is well settled law that a master is not justified in conducting a hazardous and complicated business without some system of rules and regulations calculated to lessen the risks his servants will necessarily incur while engaged in their employment. However, in the case at bar, this doctrine has no application. The record conclusively shows that the plaintiff alone was engaged in the performance of all the duties attending the work he was doing for the defendant when the accident in question occurred. That he was sufficiently mature in years, experienced, and competent, not only the testimony of many witnesses who were experienced miners, but the testimony of the plaintiff himself at the trial, very conclusively shows.

We fail to find any testimony in the record tending to show that the work plaintiff was called upon to do should have been methodized by formal rules, or that such rules in the slightest degree would have avoided the accident complained of. 5

In *Labatt's Master and Servant*, vol. 3, p. 2951, in speaking of rules in the carrying on of work in cases where necessity is shown, it is said: 6

“But in the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them. It is therefore error to leave the case to the jury where the plaintiff has offered no evidence which indicates that other employers in the same business had promulgated any such rule, or that the suggested rule was necessary or practicable, or that the necessity and propriety of making such rule was so obvious as to make the question one of common knowledge and experience.”

McCarty, District Judge, sitting in the case of *Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90, in speaking for this court, says:

“There are certain kinds of employment where, on account of their nature, it becomes necessary, and it is the duty of the master, to promulgate and publish rules and regulations for the guidance and government and safety of its employees. Especially is this true where a large number of persons are at work and the danger or safety of the employment depends largely upon all the employees performing their duties

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promptly at stated times and in a given manner. But we do not understand the rules to apply to cases such as the one in question where the very nature of the employment makes it dangerous, and the dangers incident thereto and growing out of it are of common knowledge and are fully known to and understood by the servant, and the safety of others cannot be imperiled in any way by any act or omission of his in the performance of his duties, and his safety depends wholly upon the degree of skill, care, and caution used by himself, and not upon that of his fellow servants. * * * In fact, it is not contended that the accident was due wholly or in part to any act or omission of his fellow servants; therefore the defendant cannot be held liable in this case on account of its failure to furnish its employees with printed rules, as the record shows conclusively that such failure did not in any way contribute to the accident."

To the same effect, see *Stone, Adm'r v. Union Pacific R. Co.*, 35 Utah, 305, 100 Pac. 362; *Benfield v. Vacuum Oil Co.*, 75 Hun, 209, 27 N. Y. Supp. 16; *Pern v. Wussow*, 144 Wis. 489, 129 N. W. 622.

There is no evidence disclosed in the record here that mine operators promulgate rules in any case for the government of their employees when they are engaged in the kind of work in question. On the other hand, it appears from the record here that the usual custom among miners and the one generally adhered to in mining operations is otherwise, and best stated by the plaintiff's own witness, Leonard G. Hardy, when he says:

"The procedure of a miner always counting his shots to see if he hears an explosion from each of his charges of powder is one that is universally followed by miners. It is thoroughly well known and is recognized by all miners; * * * and one cannot be entirely safe unless he thoroughly examines each of the places where he puts in charges of powder. * * * There is no way in which the danger of injury can be avoided, except a careful observation by the miner himself of the place where he has put in the holes."

The record here abounds with convincing proof that the plaintiff failed to do the things and take the precaution for himself that miners generally do while engaged in their work. As we view the record, no negligence was shown 7, 8 on the part of the defendant contributing to the injury complained of by plaintiff; nor do we find any prejudicial

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error committed by the district court in the trial of the case. The judgment therefore must be affirmed, with costs to respondent.

It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

UTAH ASSOCIATION OF CREDIT MEN v. McCONNELL

No. 3018. Decided September 10, 1917. Rehearing denied October 6, 1917. (167 Pac. 817.)

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—DIRECTORY STATUTES.** Comp. Laws 1907, sections 84-104, with reference to assignment for the benefit of creditors, is merely directory, and not to the effect that an insolvent debtor may not make a valid assignment in conformity with the rules of the common law. (Page 539.)
2. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—COMMON-LAW ASSIGNMENT—COLLATERAL ATTACK.** An assignment under which all creditors participated and were to receive their just benefits without compliance with the statute with reference to assignments was valid, and more especially one that could not be questioned by defendant in a suit by the assignee to recover damages for the breach of a contract to purchase the property. (Page 542.)
3. **VENDOR AND PURCHASER—SALE—EVIDENCE—SUFFICIENCY.** In an action for breach of contract by plaintiff assignee for the benefit of creditors against defendant purchaser of the property, evidence held sufficient to show a valid contract of sale between plaintiff and defendant by telegrams and letters between the parties. (Page 542.)

Appeal from District Court, Third District; *Hon. C. W. Morse*, Judge.

Action by the Utah Association of Credit Men against R. N. McConnell.

Judgment for plaintiff. Defendant appeals.

AFFIRMED with costs to plaintiff.

Skeen Bros. for appellant.

Thos. O. Sheckell and *Stephens & Smith* for respondent.

APPELLANT'S POINTS

The rule of law is well established that an offer to sell imposes no obligation on either party until accepted according to its terms, and that a proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer and ends the negotiations, unless the offer is renewed or the proposed modification accepted, and the offer which has been rejected cannot be revived by a tender of an acceptance of it. (*Minn. & St. Paul R. R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149, 30 L. Ed. 376.) And the acceptance must correspond to the offer on every point, leaving nothing open for future negotiations. (1 Page on Contracts, 74, paragraph 45.) If the acceptance attempted leaves open the adjustment of the price, or the time of delivery or a payment, it is of no effect. (1 Page on Contracts, 75; *Sault Ste. etc., Co. v. Simmons*, 41 Fed. 835; *Decker v. Gwinn*, 95 Ga. 518, 20 S. E. 240; *Shepherd v. Carpenter*, 54 Minn. 153, 55 N. W. 906.)

Much controversy has been had as to whether or not where there is a statute as in this state on assignments for the benefit of creditors, it is exclusive in its effect, and abolishes the so-called "Common Law Assignment for the Benefit of Creditors." In the light of statutory enactments, the title on "Assignment for the benefit of creditors" must be held to "establish the law of the state," and by implication to establish that assignment for the benefit of creditors can be made in no other way. In construing section 2489, the Supreme Court of this state has said that that section clearly means that the common law is abrogated in so far as it is repugnant to the statutes of this state. In *Rio Grande Western Railway Company v. Salt Lake Investment Company*, 35 Utah, 528 (1909), the court decided, among other things, that title by adverse possession could be secured in Utah only pursuant to the provisions of the statutes. Yet it will appear that the sections on adverse possession, in title 88, Chap. 3, are affirmative in language. The court referring to section 2489, *supra*, said:

"This, by implication at least, excludes the common law from all subjects that are regulated by statute." And later

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in the opinion: "Hence, in our judgment, the statutory method is the only one by which title by adverse possession can be acquired in this state."

In the case of *Garr v. Davidson et al.*, 25 Utah, 335, our Supreme Court, speaking through Mr. Justice Morse, said, on page 336, respecting the probate code of this state:

"The probate code * * * provides a comprehensive and specific method of procedure in the matter of the administration and distribution of estates and the determination of heirship and the right of succession."

and it was held that such method was exclusive.

Assuming that the assignment was sufficiently valid to pass title, the provisions of the assignment statute are mandatory, requiring inventory and bond as a condition precedent to the assignee entering upon his duties, and until the assignee has filed the necessary inventory and valuation and given bond, as required by the statutes, he has no power to dispose of the estate by sale, or otherwise. (*Bryant v. Langford*, 80 Cal. 542, 22 Pac. 219; *Brennan v. Willson* 71 N. Y. 502; *Von Hein v. Elkins*, 8 Hun. 516; *McCuaig v. City Sav. Bank* [Mich.], 69 N. W. 500; *Rice v. Frayser*, 24 Fed. 460; *Strong v. Brown*, 43 N. W. [Minn.] 67; *Ramsay v. Hersker*, [Pa.] 26 Atl. 433.) A purchaser at an assignee's sale has a right to obtain a clear title, and if the title offered to the defendant by this plaintiff was questionable, or open to attack, he could not be compelled to take it. (5 Corpus Juris, 1223, and cases cited.)

RESPONDENT'S POINTS

It is a well settled principle of law that a contract may be made by correspondence or by telegram, the question being whether it was intended that the letters or telegrams between the parties should constitute the agreement or simply be deemed negotiations between them. In this case, the contract was an executory contract. There was an offer and an acceptance of the offer, a meeting of minds between the parties, and where the agreement is complete by acceptance, a new proposal to modify it by either party has no effect on the agreement unless it is accepted and thus becomes a new substituted agreement. (*Hubbell v. Palmer*, 76 Mich. 441;

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McLean v. Pastime Gymnasium, 64 Mo. App. 55.) The court may acquaint themselves with the persons and the circumstances that are the subject of the statements and the written agreements, and are entitled to place themselves in the same situation as the parties who make the contract so as to view the circumstances as they view them and so as to judge the meaning of the words and the correct application of the language to the things described. (*Wood v. Kelsey*, 90 Ark. 272.)

An assignment, voidable as against a creditor, may be good as between the parties and all other persons except the creditors. While, with certain qualifications, it is a rule that creditors may attack the validity of an assignment, the right is denied to an entire stranger. (*James v. McPhee*, 9 Colo. 486; *Butler v. Wendell*, 57 Mich. 62.) It is a further principle of law that an assignment, valid on its face, cannot be attacked collaterally. (*McCandless v. Haden*, 98 Iowa, 321; *Staples v. Schulenburg*, 62 Minn. 158; *Second National Bank v. Schranck*, 43 Minn. 38; *McCourt v. Bond*, 64 Wis. 596.) Where a deed of assignment is made to which the creditors do not become parties, the powers conferred upon the trustee may be revoked and the trust destroyed by an arrangement between the grantor and the trustee to that effect, but to be valid, it must be done before the creditors under the deed of trust have assented to its conditions, or have done anything entitling them to rely on the funds so created for the payment of their claims. (*Gibson v. Reese*, 50 Ill. 383.)

CORFMAN, J.

Plaintiff, as assignor, brought an action in the district court of Salt Lake County for damages alleged to have been sustained by reason of the defendant's refusal to receive and pay for a stock of merchandise and other personal property under a contract of sale entered into between the plaintiff and the defendant. Briefly stated, it is alleged in the complaint that on April 25, 1912, the Regulator Company, a corporation, was engaged in business at Richfield, Utah, and on said day executed and delivered to the plaintiff a voluntary

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assignment for the benefit of its creditors of a stock of merchandise, fixtures, and other personal property, which assignment was accepted by the plaintiff; that thereafter said property was sold under contract to the defendant for \$8,500, and the price reduced to \$8,450 by reason of the loss of a certain horse valued by agreement of the parties at \$50; that the defendant refused to accept the property and pay the purchase price of the same, to the damage of the plaintiff in the sum of \$1,000, for which plaintiff prayed judgment, including interest and costs of suit,

A general and special demurrer to the complaint was filed by the defendant, which was overruled by the court.

The answer, briefly stated, admits the assignment by the Regulator Company to plaintiff; denies, generally, all the other allegations of the complaint except defendant's refusal to accept the property and pay the purchase price thereof, which defendant admits; and, as an affirmative defense, affirmatively alleges that the plaintiff did not file with the county clerk of Sevier County, where the property was located, an inventory and valuation of the assigned property, nor give bond for the use of the creditors of the Regulator Company as required by law.

Trial was had to the court without a jury, resulting in judgment for the plaintiff. Defendant appeals.

The evidence produced at the trial was largely documentary, and shows that the contract upon which plaintiff bases its action is made up chiefly of a series of letters and telegrams concerning the purchasing and taking over by the defendant of a stock of merchandise, store fixtures, etc., assigned by the Regulator Company to plaintiff for the benefit of its creditors. The testimony further shows that the Regulator Company had made a previous assignment of the same property to one C. W. Coons, but, by an arrangement of the Regulator Company and its creditors, this previous assignment was vacated and set aside. The assignment made by the Regulator Company to plaintiff was in writing, but not acknowledged; nor was it filed in the office of the clerk of the district court of Sevier County, the county in which the

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property was situated; nor was any bond given by the plaintiff, as assignee, for the use of the creditors of the Regulator Company. The testimony also shows that under the assignment to it the plaintiff proceeded to send out notices to all the creditors of the Regulator Company for them to file their claims with the plaintiff, and also notice of the property or assets on hand to be sold and disposed of under the assignment.

Responding to these notices, the communications herein set forth were had between the plaintiff and the defendant concerning the sale of the assets of the Regulator Company, constituting, as claimed by plaintiff, the contract of sale entered into between the plaintiff and defendant upon which the plaintiff's action was predicated:

"Los Angeles, Cal., 5/7/12.

"The Utah Ass'n of Credit Men, Salt Lake City, Utah.—Gentlemen: In re Regulator Co., Richfield, Utah. I represent Utz & Dunn for \$873.

"Please send me a list of the creditors with addresses and amount due respectively. Also what the assets consist of under your inventory and what day the assets will be sold in bulk. Please give me one week to ten days notice as I will be present or wish to be when stock is sold. I await your earliest reply for which I will thank you.

"Yours truly, R. N. McConnell."

"Salt Lake City, Utah, May 9, 1912.

"Mr. R. N. McConnell, Attorney at Law, Trust & Savings Bldg., Los Angeles, Cal.—Dear Sir: Answering your letter of May 7th, we wired you this morning as follows:

" 'Are advertising stock of Regulator for sale at our office, Saturday, May eighteenth, at two p. m.' "

"We inclose herewith copy of a circular letter sent to all creditors of this estate, also notice of sale, as therein referred to.

"The liabilities of this corporation are distributed among 76 creditors, and unless the list of same in detail is wanted by you for some specific purpose, we shall wait until you

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come to Salt Lake City before furnishing same, on account of being so busy in our office with much extra work.

"Yours truly,

"The Utah Association of Credit Men,

"By _____."

The testimony shows that, after these communications were had between the plaintiff and the defendant, the defendant appeared at the office of the plaintiff in Salt Lake City on May 18, 1912, the time and place fixed for the sale of the assets of the Regulator Company. The defendant was then shown an inventory of the property. Bids were made for the property, the plaintiff bidding, among others, but all bids were then rejected by the plaintiff, including the bid of the defendant on account of same being too low in price. The plaintiff, after the bidding, offered to accept \$8,500 for the property, and gave the defendant some time to consider whether he would accept plaintiff's offer at that price. The defendant then departed for Oklahoma, and thereafter the following communications were had between the plaintiff and the defendant concerning the purchase of the property:

"Oklahoma City, Okla., May 23, 1912.

"Arthur Parsons, c/o Z. C. M. I., Salt Lake City, Utah: Meet you part way on our difference, will give eight thousand dollars Regulator stock fixtures and lease time you have paid. Wire answer. Will then check over inventory to know substantially correct. Pay six now, other two when you deliver stock. Answer.

"R. N. McConnell."

"May 24th, 1912.

"R. N. McConnell, Oklahoma City, Oklahoma: Answering night letter to Mr. Parsons, committee sees no present reason to recede from price previously fixed. If you want the stock at our price, better accept quickly as prospects are good for sale at our price to other parties.

"Utah Association of Credit Men."

"Oklahoma City, Okla., May 24, 1912.

"Utah Association of Credit Men, Care of George E. Forrester, Salt Lake City, Utah: I accept option given me up to

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today eight thousand five hundred dollars on Regulator Company proposition made me last Sunday. Wire confirmation and I will pay money holding small part until you have custodian deliver and show everything right and safe as per your statement. I give your price rather than have bankruptcy controversy.

R. N. McConnell."

"May 25, 1912.

"R. N. McConnell, Oklahoma City, Oklahoma: We accept your offer of eight thousand five hundred dollars for stock, fixtures and lease of Regulator Company. Advise when deal can be completed. The horse which with wagon and harness inventoried one hundred dollars accidentally killed. Will allow credit fifty dollars for same.

"Utah Association of Credit Men."

"Oklahoma City, Okla., June 3, 1912.

"Utah Ass'n of Credit Men, Salt Lake City, Utah: Manager Wahl closing inventory stock. Sale Porter today, will leave Wednesday afternoon for Salt Lake.

"R. N. McConnell."

"Oklahoma City, Okla., June 6, 1912.

"The Utah Association of Credit Men, Salt Lake City, Utah—Gentlemen: In re Regulator Stock, Richfield, Utah. My manager, Mr. F. H. Wahl, left here yesterday for your city and will arrive there Sunday, and I now beg to ask that you be at your office at 5:00 o'clock Sunday afternoon so that you can have a 15 minute talk with him and if you deem it best, send some one from your office with him Monday down to Richfield. He will look over the stock and receive the inventory and keys thereto and if all is as was represented, he will turn over to you check for \$8,450.00 The purchase price being \$8,500.00 less \$50.00 deduction for the horse. He arrived here late yesterday and left late last night and therefore had only my personal check. I told him when he found everything satisfactory, and was given possession of the property, that he could wire me to that effect and I would then have my bank wire the bank at Richfield, that my check for that amount would be duly paid.

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"I trust that everything is in proper shape and that the deal will be closed agreeably to yourself and Mr. Wahl.

"The store will not be opened for at least 5 days and if you do not care to incur the telegraphic expense of possible \$2.00 to know that the check is good, you can tell Mr. Wahl that he need not wire and ask the bank to wire that the check is good as the check will clear before the store is opened, however, if you must have telegraphic advice on the check, I have no objection as I told Mr. Wahl to tell you that before delivery, this would be done if you so requested.

"Please let me know what day the estate will be closed and the funds distributed.

"Furthermore, I believe you ought to waive any charge on my claim as we have given you an extra fine figure for the stock. Please send me one of your blank forms of assignment and I will file the claim and trust you can favor me with waiver of charges, owing to the fact that we have been subjected to very heavy expenditure in looking after the matter and aided you largely in bringing a big price for the stock of goods. I await your reply.

"Yours truly, R. N. McConnell."

The testimony further shows that Mr. Wahl came to Salt Lake City as announced by defendant that he would do, made a visit to Richfield, and the defendant then refused to accept the stock or pay the plaintiff for the same, and that thereupon the plaintiff sold and disposed of the property in question to third parties for the sum of \$7,500.

The errors assigned by defendant are numerous. Primarily, however, they present but two questions for consideration by this court, namely: (a) May the assignment made by the Regulator Company of its assets to the plaintiff for the benefit of creditors be questioned by the defendant in this action? (b) Was there a valid contract of sale entered into between the plaintiff and the defendant?

(1) It is contended by defendant's counsel with much earnestness that the Utah statute relative to assignments for benefit of creditors is exclusive in effect; that it establishes the only course to be followed in making assign- 1

ments for the benefit of creditors, and that a valid assignment cannot be made otherwise by a debtor than by a full compliance with its express provisions.

Comp. Laws 1907, tit. 5, section 84 (the statute in question), among other things provides:

“An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the benefit of creditors, in conformity with the provisions of this title.”

Section 88 provides:

“Every such assignment shall be by an instrument in writing, * * * executed and acknowledged in the manner prescribed for the execution and acknowledgment of deeds, and recorded in the office of the recorder of the county where the property assigned is located. The assignor shall annex to such instrument an inventory, under oath, * * * according to the best of his knowledge. * * * As soon as such instrument is recorded, it shall be filed, with the inventory and list of creditors, in the office of the clerk of the district court of the county in which the property so assigned is located, as shall also all subsequent papers connected with such proceedings.”

Other provisions of the statute provide for the giving of a bond for the use of creditors, the giving of notice of the assignment by publication in a newspaper, the mailing thereof to creditors, and that the assignee shall be under the supervision of the court or judge.

Counsel for the defendant in their brief have cited numerous decisions construing the statutes of several states, notably New York, Kansas, Arkansas, New Jersey, Oregon, Texas, and Iowa, holding that provisions of their statutes somewhat similar to our own are mandatory, and unless the formalities of the statutes are complied with an assignment is invalid. We have carefully reviewed all these authorities, and we find none applicable to the case at bar. In many of the cases cited by counsel the validity of the assignment was questioned by the creditors of the assignor, or by debtors not recognized under the assignment. In others the assignment

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was directly attacked by creditors under insolvency statutes, or under statutes expressly providing that the assignment shall be invalid unless the provisions of the statutes are observed and complied with. It will be readily seen that the Utah statutes in question are merely directory that "an insolvent debtor may * * * execute an assignment * * * in conformity with the provisions of this title." No express limitation is made by the statute itself, nor do we think a limitation can be reasonably implied from the wording, to the effect that a valid assignment may not be made in conformity with the rules of the common law without compliance with the formalities in the statute prescribed. As is said in 5 C. J., at page 1173:

"The validity of assignments, except as otherwise provided by statute, is to be determined on principles of the common law, and a general assignment has frequently been held to operate as a common-law assignment, although not valid as a statutory assignment."

In the case of *Lucy v. Freeman*, 93 Minn. 274, 101 N. W. 167, Brown, J., in commenting upon the questions there involved, and very similar to the case at bar, says:

"It is elementary that parties may make and enter into such contracts, bargains, and agreements as they may deem best for their interests, and neither the Legislature nor the courts have the power or right to restrict them in the exercise of that privilege, so long as their contracts are not immoral or tainted with positive illegality. In the case at bar Dittbenner was insolvent and unable to pay his debts, and to satisfy his creditors, or those who should participate in the transaction, he conveyed the property in question to plaintiff, as trustee, under the agreement of plaintiff to convert the same into money and pay and discharge Dittbenner's debts. The transaction amounted in effect to an assignment for the benefit of creditors; not an assignment under our insolvency statutes, or made in conformity with the statutory regulations of common-law assignments, but a common-law assignment pure and simple. The contention of defendant is that all such assignments, where the statutes regulating them are not complied with, are absolutely void, not only as to creditors and subsequent purchasers in good faith, but as between the parties themselves. Section 4227, Gen. St. 1894, provides that every conveyance or assignment made by a debtor of the whole or any part of his estate in trust to an assignee for the benefit of creditors shall be void unless * * * acknowledged, * * * and unless the same be filed in the office of the clerk of the district court. * * * The purpose of the statute was not to restrict

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the rights of parties to contract on such terms and conditions as they might deem for their best interests. * * * The right to make a common-law assignment for the benefit of creditors exists independent of statutes.”

The assignment in question was a general assignment, without preference, of a stock of merchandise, fixtures, etc., for the benefit of all the creditors of the Regulator Company, of which no creditor or debtor, so far as the record here shows, complained or had any cause to complain; in fact, an assignment under which all the creditors of the assignor participated, and were to receive their just benefits alike without compliance with the provisions of the statute invoked by defendant, concerned only as a third party. In our opinion it was just as legal, binding, and effective, under the circumstances, upon all the parties to it, as if the statute in question had been complied with in every particular as to formalities, execution, and procedure under it. It is not our purpose nor do we wish to be understood as here deciding that in a proper case under the Utah statute creditors may not complain of the failure to comply with statutory formalities and procedure; but what we do now decide is that the case at bar presents in all its phases a valid assignment made by the Regulator Company to plaintiff, and more especially an assignment that may not be legally questioned by one occupying the position of the defendant in this action.

(2) The further contention is made by defendant that the several communications had by telegrams and letters between the plaintiff and the defendant did not constitute a legal contract. Again counsel for defendant in their brief have cited numerous authorities for the purpose of sustaining their contention that the letters and telegrams in question merely constituted negotiations for the purchase of the property held in trust by the plaintiff as assignee of the Regulator Company for the benefit of its creditors rather than an absolute contract to purchase. No good purpose would be subserved in entering upon a discussion here as to the applicability of the cases cited in defendant's brief to the case at bar. They are not in point.

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Preliminary to the opinion we have set forth verbatim the written communications relied upon by the plaintiff as constituting the contract between it and the defendant. To our minds the primary elements of a contract, that of an offer and acceptance, are clearly disclosed by the written communications referred to. It is clearly shown that the plaintiff offered to sell the property to defendant for \$8,500.00. Under date of May 24, 1912, defendant wired the plaintiff:

"I accept option given me up to today eight thousand five hundred dollars on Regulator Company proposition made me last Sunday."

The plaintiff replied by wire May 25:

"We accept your offer of eight thousand five hundred dollars for stock, fixtures and lease of Regulator Company. Advise when deal can be completed. The horse which with wagon and harness inventoried one hundred dollars accidentally killed. Will allow credit fifty dollars for same."

Defendant replied June 3d by wire:

"Manager Wahl closing inventory stock. * * * Will leave Wednesday for Salt Lake."

Then again defendant replied by letter, June 6th:

"My manager, Mr. Wahl, left here yesterday for your city and will arrive there Sunday. * * * He will look over the stock and receive the inventory and keys thereto, and if all is as was represented he will turn over to you check for \$8,450.00, the purchase price being \$8,500.00 less \$50.00 deduction for horse."

Thereafter the testimony shows that Mr. Wahl duly arrived in Salt Lake City, and, accompanied by plaintiff, proceeded to Richfield, and there defendant refused to accept or pay for the property.

It is contended by counsel for defendant that the acceptance of the plaintiff's offer to sell for \$8,500, less \$50, the value of the horse, was conditioned on the part of the defendant, the condition being "if as represented." There is nothing in that contention; for, as a matter of law, it would be implied in any case that acceptance is based upon the condition "if as represented." There is nothing in the record here

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to show otherwise than that everything concerning the transaction and the property was just exactly as represented. Further, the record shows that the defendant personally acquainted himself while in Salt Lake City with the character and the inventory of the property, and all the conditions and purposes surrounding the selling and disposing of it by the plaintiff. If after accepting plaintiff's offer to sell on further investigation, the defendant found the property to be otherwise than as represented to him by the plaintiff, he well might have had just and legal cause to refuse to accept and pay for it; but no such contention is made, nor can be made on the record before us. The record here does not disclose but that the property was in every particular as represented and as defendant understood it to be when he accepted plaintiff's offer to sell.

Such transactions as are involved in this case are but the common, ordinary, and everyday transactions of commercial life, and should not be complained of nor repudiated by either party when not attended with fraud or unfair dealing.

The judgment of the district court, in our opinion, both as to the facts and the law of this case, is amply sustained by the record and must be affirmed. It is so ordered. Costs to plaintiff.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

MAKRIS v. MELIS et al.

No. 2993. Decided August 25, 1917. Rehearing denied October 9, 1917. (167 Pac. 802.)

1. **CONTRACTS—CONSTRUCTION—RULES.** In construing a written contract it is the duty of the court to consider all of its terms and the relationship of parties at such time, and, if possible, to arrive at their actual intent. (Page 548.)
2. **CORPORATIONS—SALE OF STOCK—CONTRACTS—CONSTRUCTION.** Defendants organized a mercantile corporation and entered into a contract with plaintiff for the sale of twenty-two shares of the company's stock. The contract was written in Greek, which was the native tongue of the parties, and recited that the defendants had sold plaintiff

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twenty-two shares in the company for a named consideration, that defendants acknowledged him a copartner to the extent of his shares, and that he should be responsible for losses and entitled to profits thereafter. Comp. Laws 1907, section 330, declares that stock shall be deemed personal property, and delivery of a stock certificate of a corporation, together with a written transfer signed by the owner to a bona fide purchaser or obligee, shall be deemed a sufficient transfer as against any creditor of the transfer. *Held* that, though the contract recited that the sellers reserved the right to deliver the shares, it should be construed in connection with the statute, and casts on the sellers the duty to deliver to plaintiff the certificate for the shares. (Page 548.)

3. CORPORATIONS—SALE OF STOCK—ACTIONS—DAMAGES. Sellers of corporate stock who failed to deliver certificates as required cannot defeat an action for damages on ground that corporation subsequently became insolvent, where it was solvent for more than two years after sale, during which time shares were worth amount paid therefor. (Page 548.)

Appeal from District Court, Third District; *Hon. F. C. Loofbourow*, Judge.

Action by Konstantinos Makris against Nicolaos Melis and others.

Judgment dismissing complaint. Plaintiff appeals.

REVERSED and remanded with directions.

Allan T. Sanford and *Aaron Myers* for appellant.

H. L. Mulliner for respondent.

GIDEON, J.

The controlling question on this appeal is the construction of the written contract between the parties. Plaintiff alleges the existence of the contract, the payment of the moneys stipulated therein by him to be paid to the defendants, and the failure and refusal on the part of the defendants to deliver to him the shares of stock mentioned in the contract, and damages by reason of such failure. The defendants Nicolaos Melis and Konstantinos Melis, the only two defendants answering, among other things alleged that plaintiff

purchased, not from the defendants but from the Italian-Greek Mercantile Company, twenty-two shares of that company's capital stock, and that the moneys paid by the plaintiff were paid to that company; that the said mercantile company at that time was not designated, conducted, or regarded by the owners thereof as strictly a corporation, but was, on the contrary, regarded and conducted as a partnership; that the answering defendants had no certificates of stock delivered to them, and had no power to execute or deliver certificates to the plaintiff, and denied that plaintiff ever demanded certificates of stock from them; that after the contract plaintiff was recognized as an owner or stockholder in the business to the amount of the interest he had purchased; that he claimed to be such owner and was entitled to all the rights and privileges of an owner and stockholder of said company; that the said company was declared insolvent and a receiver appointed on the 24th day of April, 1914; and that after the appointment the plaintiff continued to make such claim of ownership until the said company was declared a bankrupt. Defendants denied any liability to the plaintiff for damages or otherwise.

Trial was had before the district court of Salt Lake County, and at the conclusion of the plaintiff's testimony defendants moved for a nonsuit and dismissal upon the following grounds: "That the plaintiff had not made out a prima facie case, and that their own evidence shows that they are not entitled to recover in this action."

It appears from the record that in April, 1906, the defendants L. G. and E. C. Skliris, together with three others, organized a corporation for the purpose of carrying on a general mercantile business in Salt Lake City, Utah, and elsewhere in the state of Utah, to be known as the Italian-Greek Mercantile Company, and that the authorized capital stock was \$10,000, represented by 100 shares of the par value of \$100 each; that all of said stock was issued to the incorporator; that subsequent to the date of incorporation, to wit, about March 5, 1908, the two defendants Melis bought one-half of the original outstanding capital stock, and thereby

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became half owners in the business with the two defendants Skliris. It also appears that certificates of stock were issued to the original incorporators, and at the date of the purchase by the defendants Melis those original certificates were surrendered to the company and canceled, and new certificates were issued to such defendants. It further appears from the testimony that in October, 1910, the defendants, who were then the owners of all of the stock of the company, sold 33 shares of stock to one Mantis, and that on February 9, 1911, the contract in question was entered into between the plaintiff and defendants. That contract was originally written in Greek, that being the native tongue of the parties to this action, but it is admitted by both plaintiff and defendants that the following is a correct translation of the same:

"The undersigned, Evangelos G. Skliris, Nicolaos Melis, Konstantinos Melis, and Leonidas G. Skliris, residents of Salt Lake City, Utah, sold on this day to Konstantinos Makris, resident of Salt Lake City, Utah, twenty-two (22) shares of the Italian-Greek Mercantile Co. of Salt Lake City, Utah, for the consideration of two thousand one hundred dollars (\$2,100.00) of which have received from him this date in cash, one thousand five hundred (\$1,500.00) dollars and the balance of six hundred (\$600.00) dollars shall Konstantinos Makris pay to us within three months from date. That we acknowledge him as a copartner to the Italian Grocery Co. to the extent of his shares from the twenty-fifth of October, 1910. That he shall be responsible from that date for the losses and payments, and that he shall be entitled to the profits. That we reserve the right to deliver him the shares.

"This was accepted by Konstantinos Makris, and in accordance this was dictated in duplicate and was signed by all legally.

"[Signed] The Contracting Parties:

"E. G. Skliris,

"N. B. Melis,

"K. D. Makris."

In attempting to determine just what the parties to the foregoing contract intended, and upon which there was a

meeting of minds, it is necessary to consider the relationship of the parties and their understanding of the ordinary terms of such a paper. None of the parties to this 1, 2, 3 contract was an adept in putting into legal phraseology the terms of the contract. The language used to express the intention is somewhat indefinite and apparently somewhat contradictory. It is the duty of a court in construing a written contract to consider all of its terms and the relationship of the parties at such time, and, if possible, arrive at the actual intent of the parties and upon what their minds met. We think it is possible in construing this contract, under the circumstances that surrounded the parties, to determine the meaning of the contract and the understanding of the parties at the time of its execution.

That the plaintiff in that contract understood he was purchasing from the defendants twenty-two shares of the capital stock of the corporation mentioned does not seem to be in any way doubtful. That the defendants understood they were either selling or agreeing to sell a like number of shares is not open to question. The contract price was agreed upon and mentioned in the contract. The amount paid at the execution of the contract, and the balance to be paid, and the time when it was to be paid, are definitely stated. That the payment of the balance of the purchase price was subsequently made by the plaintiff is not disputed. But it is contended by defendants that corporate stock is personal property and, as such, is subject to sale and transfer by any writing or bill of sale purporting to sell stock, and that a certificate of stock is not the right or thing sold, but is merely evidence of such right or thing, or, as expressed by defendants' counsel, is simply the muniment of title and not the right itself; that, when the defendants executed the contract in question, thereupon the plaintiff became a stockholder and lost no rights by failure of the defendants to deliver the certificates of stock representing his purchase in the corporation.

But do the facts warrant such a conclusion? We have a statute in this state (Comp. Laws 1907, section 330); regulating or directing the method of transfer of stocks as follows:

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“Stock shall be deemed personal property, and the delivery of a stock certificate of a corporation, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title as against any creditor of the transferor and all other persons whomsoever; provided, that for the purpose of voting, and of receiving dividends, and of levying and collecting assessments, and wherein the corporation is otherwise interested, the holder of record, as shown by its books, shall be treated and considered as the holder in fact, and the transferee shall have no rights or claims as against the corporation until transfer thereof be made upon the books of the corporation or a new certificate be issued to him.”

Under that section the plaintiff had no right or claim against the corporation to compel it to recognize his interest until the stock representing such interest was transferred to him upon the books of the corporation or a new certificate issued. Was it not then the duty of the defendants to give, as well as the reciprocal right of the plaintiff to receive, under the contract and under the foregoing statute (which is incorporated into and becomes a part of every contract for the sale of corporate stock), the right in the corporation, and also the evidence or muniment of such right, so that he could assert and enforce it against the corporation itself, and sell and transfer such right if he desired? The evidence discloses, and that is not disputed, that the defendants held certificates of stock representing the number of shares sold to the plaintiff. Plaintiff, having paid the agreed price, was entitled, as above indicated, to have defendants give him the evidence of the right that he had purchased, and doubly so where, as in this case, that evidence is held by the parties receiving the consideration for such stock. Transfers must be made as provided by the laws of the state under whose laws the corporation was organized and exists. 10 Cyc. 593.

There is no evidence, or intimation of evidence, to support the allegations of the answer that the plaintiff bought, or agreed to buy, the stock from the corporation itself, or negotiated with the corporation for any such stock. In fact, the record discloses that the corporation had no stock; that the

full amount of the stock authorized had been issued to the defendants. It is not disputed that the plaintiff at the date the last payment was made requested that the stock be issued to him; that on various occasions thereafter he made a like demand upon the defendants, and through various excuses the defendants never delivered, or offered to deliver, him the stock; that after a year or more had passed he requested the delivery of the stock from the defendants or the repayment of the money that he had paid; that the stock was promised to him, and at other times the money was promised, as testified to by the plaintiff. The testimony also establishes that at the time this stock was purchased, and for two years thereafter, the assets of the corporation were such that the stock was worth its full face value, and that condition existed and continued long after the plaintiff had ceased to try to get the stock from defendants and had demanded repayment of the money which he had paid to them.

Some point is made that by reason of one particular clause in the contract, to wit, "that we reserve the right to deliver him the same," the defendants were under no legal obligation at any time to deliver to the plaintiff the shares of stock mentioned in the contract. Such a construction would be inconsistent with the other provisions of the contract. As stated above, these parties were not experts in preparing legal documents, and it is not at all reasonable that the parties intended any such a reservation of right on the part of the defendants. When considered in connection with the remainder of the contract, that sentence was intended to mean, if it can be given any meaning whatever, that the defendants reserved the right to retain the certificates of stock until the plaintiff had fully paid for the same.

It is not necessary to determine in this case that certificates of stock cannot be sold and the title to the same transferred by a bill of sale or other written agreement; but we simply hold that in this case, whether the title passed at the date of the sale or subsequent thereto, the plaintiff, under the terms of the contract, was entitled to receive, and it was the duty of the defendants to give to him, certificates of stock in the corporation representing his interest therein. In fact, the

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certificates of stock held by the defendants themselves provide that the same shall be "transferable only on the books of the corporation by the holder hereof in person or by attorney upon surrender of this certificate properly indorsed." In other words, the position of the plaintiff, by reason of the acts of defendants in not transferring and delivering to him certificates of stock held by them, was that he had no means or way of compelling the corporation to recognize his interest or rights therein, and the stock for which he had paid was subject to claims of the creditors of the defendants, and might be treated and considered as the property of the defendants, and he, the plaintiff, have no rights or claims as against the corporation until the transfer of the same be made upon the books of the corporation or a new certificate issued to him.

It may be contended that the plaintiff had a right to compel the defendants to deliver to him the stock, the same being the evidence of his interest in the corporation. But be that as it may, there was, on the other hand, the duty of the defendants, under their contract, to furnish such evidence or certificates of stock to the plaintiff, and in not doing that they broke the contract with the plaintiff.

In view of the conclusions at which we have arrived, the question of the sufficiency of the motion for a nonsuit becomes immaterial and no opinion is expressed thereon.

It follows from the foregoing that the lower court erred in sustaining the motion for nonsuit. The judgment is therefore reversed, and the cause is remanded, with directions to set aside the order of dismissal, and to reinstate the case upon the calendar and proceed with the trial of the same. Respondents to pay costs.

McCARTY, CORFMAN, and THURMAN, JJ., concur.

FRICK, C. J.

I concur. There are four parties named in the contract of sale. Although all of the four were duly served with summons, only two of them appeared and defended the

action. The two not appearing have, therefore, confessed the allegations of the complaint. In my judgment the two who have answered, however, have not interposed any legal defense to the complaint, except the limited defense that is contained in the general denial after having admitted the execution and delivery of the contract sued on.

From what appears in the record, it seems the district court considered only the contract sued on, and arrived at the conclusion that under it plaintiff had no cause of action. As I view it, that conclusion is clearly erroneous. To my mind, it is very clear that the four defendants named sold to the plaintiff twenty-two shares of the capital stock of the corporation named in the contract, which stock they owned in their individual right, for the sum of \$2,100, of which the plaintiff paid \$1,500 in cash, and agreed to pay the remaining \$600 within three months from the date of the contract of sale. The proof shows without dispute that the plaintiff paid the remaining \$600 within the specified time, and repeatedly demanded either to have the stock delivered to him or that the defendants repay the money he had paid for the same. The defendants did neither; hence this action.

A defense is attempted to be based on certain stipulations of the contract. While it is a cardinal rule of construction that all of the stipulations of a contract must be given their usual and ordinary meaning and intended force and effect, yet it is also a well-recognized rule of construction that, in case a stipulation in a contract merely expresses what the law implies, the stipulation will be given the force and effect only that is implied by law. The latter rule is manifestly applicable to some of the stipulations in the contract in question. For example: The statutes of this state provide what the rights of each stockholder are by making each share of corporate stock of the same class equivalent in power and right to every other share of stock. When the plaintiff, therefore, purchased the twenty-two shares of stock, his rights in the corporation were determined by law. It follows, therefore, that the provision of the contract, "that we acknowledge him as copartner to the extent of his shares from the twenty-fifth day of October, 1910," can be given no other effect than

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to fix the time when his property rights in the corporation began, providing the sale was consummated by a delivery of the stock to him and was transferred on the books of the corporation.

The other stipulation, "that he shall be responsible from that date for the losses and payments and that he shall be entitled to the profits," is a matter entirely determined by law; that is, no one is actually a stockholder in a corporation, as against the corporation and as against the stockholders generally, unless he originally subscribes for stock, or unless he purchases it from some one other than the corporation, and the stock is delivered to him, and it is transferred on the books of the corporation. In this case the defendants sold to the plaintiff the twenty-two shares of stock, but they have failed and neglected to deliver the same to him. They have, therefore, breached their contract of sale, and thereby have prevented plaintiff from completing the relationship of stockholder and of enjoying the benefits, if any, of such relation. The legal rights of the plaintiff as against the defendants, therefore, are precisely the same as though the defendants had sold him any other personal property, had received the purchase price therefor, and had failed to deliver the property to him at the time stipulated, or upon demand if no time was stipulated.

Nor does the provision in the contract, "that we reserve the right to deliver him the shares," affect the foregoing conclusions. If it be contended that it means something different from the meaning given it by Mr. Justice GIDEON in his opinion, then it has no force or effect whatever, since it is clearly repugnant to every other provision of the contract, and manifestly contrary to the general intent and purpose of the parties in entering into the contract. In 2 Elliott on Contracts, after discussing the effect of repugnant stipulations and clauses in contracts, in section 1515 it is said:

"But while words or clauses in a contract apparently repugnant should be reconciled if it can be done by any reasonable construction, yet a proviso which is utterly repugnant to the body of the contract, and irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside or rejected; likewise a sub-

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sequent clause, irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside or rejected.”

While courts long hesitate to enforce the rule above stated, yet where, as here, the effect of the subsequent clause would entirely nullify all that is before said in the contract, and would have the effect of giving the defendants both the contract price and the thing sold, but one conclusion is permissible, and that is that the latter clause must either be rejected or be given some subordinate effect.

In my judgment, as the record now stands, the plaintiff is clearly entitled to judgment as prayed for in the complaint.

LOMBARD v. COLUMBIA NAT. LIFE INS. CO.

No. 3033. Decided October 4, 1917. (168 Pac. 269.)

1. **APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.** If a life policy was not in force at the time of the death of insured, no subsequent delivery could give it any validity, and the exclusion of any correspondence had between the insurer and insured's agent, with reference to the whereabouts of the policy, subsequent to such date, could not be prejudicial error. (Page 558.)
2. **APPEAL AND ERROR—EXCLUSION OF EVIDENCE—HARMLESS ERROR.** In an action on a life policy, delivery of which was denied, exclusion of letters between the insurance company and insured's agent, which would have established nothing more than a request to it to refund the premium, and a failure of the company so to do, could not prejudice defendant company. (Page 559.)
3. **INSURANCE—DELIVERY—SUFFICIENCY.** Where the premium was paid on the date of the application, and a receipt issued, stating that if the policy was subsequently issued, it should be in force from that date, the issuing of the policy and sending it to the company's general agent, who in turn sent it to the agent, who took the application, but who had severed his relations with the company, constituted delivery, although the policy was never received by insured. (Page 560.)
4. **WITNESSES—PRIVILEGED COMMUNICATIONS—PHYSICIANS.** That insured was afflicted with and died of cancer, and that, after physicians had told him that the disease was incurable, insured wept and voluntarily stated that he had been suffering with his stomach and pains in his back for two years, could not be proved by the testimony of insured's attending physician, in view of Comp. Laws 1907, sec-

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tion 3414, as amended by Laws 1911, c. 109, providing that a "physician or surgeon cannot without the consent of his patient be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." (Page 561.)

5. **INSURANCE—CAUSE OF DEATH—PROOF—SUFFICIENCY.** That, after insured's physician had advised him that his condition was serious, and his disease incurable, the insured voluntarily stated that he had been suffering with his stomach and pains in his back, would not, standing alone, prove or tend to prove that insured died of cancer, or prove the nature of the disease that caused his death. (Page 563.)

Appeal from District Court, Second District; *Hon. N. J. Harris*, Judge.

Action by John F. Lombard against the Columbia National Life Insurance Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

Williams & Williams for appellant.

George McCormick and *A. E. Pratt* for respondent.

APPELLANT'S POINTS

"It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish agency in any given case. That is a question which must be determined in view of the facts in each particular case. Whatever form of proof is relied upon, however, must have a tendency to prove agency, and must be sufficient in probative force to establish it by a preponderance of the evidence. It may be said in general terms, however, that whatever evidence has a tendency to prove the agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it. So if evidence has first been introduced tending to prove the agency or to make out a prima facie case thereof, the admissions and declarations of the alleged agent, if otherwise competent, may then be shown, and the whole case be passed upon by the jury." (*Mechem Agency*, 2nd Ed., Vol. 1, Sec. 299. See also *McCormick v. Queen of Sheba Mining Co.*, 23 Utah 71.)

The various questions propounded by the defendant to Dr. Worrell, objected to and objection sustained by the Court, it will be found, are based upon the simple fact that the relation of physician and patient existed between the witness and the deceased. The appellant insists that the showing of that fact alone was not enough to justify the rulings of the trial court in sustaining any of the objections made, and clearly not as to communications offered to be shown by the witness, made to him voluntarily by the deceased, and wholly independent of the ascertainment by the doctor of any facts or statements relating to the ailment of the deceased, and not in any way necessary to enable the doctor to prescribe or act for his patient. (Wigmore, Evidence, Vol. 4, p. 3347 et seq.)

RESPONDENT'S POINTS

Actual manual delivery is not essential to a legal delivery. So held with respect to deeds as well as policies. It is a matter of intention. (14 R. C. L. 898, Sec. 76; 16 Am. & Eng. Enc. of Law 855; *Bowen v. Prudential Ins. Co.* [Mich.] 51 L. R. A. N. S. 587; *Yonge v. Equitable Life Ass'n*, 30 Fed. 902; *Neff v. Metropolitan Life Ins. Co.*, 73 N. E. 1044; *Dibble v. Northern Assurance Co.*, 14 A. S. R. 470; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Phoenix Assurance Co. v. McArthur*, 67 A. S. R. 154; *N. Y. Life Ins. Co. v. Babcock*, 69 A. S. R. 134. See also Notes to 138 A. S. R. 47, 51.)

The defendant did all it could to deliver the policy into the actual possession of Joseph L. Lombard. There was a purpose and intention to deliver, conclusively shown by the testimony of defendant's witnesses, Brown, Dickerson and Girard. The receipt for the premium showed an intent to treat the acceptance of the risk and retention of the premium and issuance of the policy as a delivery.

GIDEON, J.

The plaintiff brings this action to recover from defendant the amount of an insurance policy issued upon the life of plaintiff's brother, Joseph Lombard.

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It appears from the record that on the 5th day of December, 1914, at Firth, Idaho, the deceased made application to the defendant for a life insurance policy. After answering the questions contained in such application and passing the physical examination required, the insured paid one C. F. Girard, soliciting agent, the first or annual premium of \$83.78, and received from such soliciting agent a receipt signed by the secretary of the defendant for that amount. Among other things the receipt contained the following:

"Such insurance to be in force from the date of this receipt provided the application therefor be approved by the company at its home office in Boston and a policy issued on the plan applied for, the company reserving the right to disapprove, reject or postpone such application, and unless the policy is actually issued incurring no liability hereunder except for the return of any moneys paid hereon if the application be not accepted."

The application was forwarded to the home office of the defendant, and was received in the latter part of January, 1915. The defendant, within a week or so after the receipt of the application, issued two policies to the insured, one health and one life, and the same were dated December 5, 1914, that being the date of the application. The life policy was numbered 48252, and that is the only policy in question here. The two policies were then forwarded by the secretary of the company to F. W. Dickerson, its general agent for the state of Idaho, located at Pocatello in such state, with directions not to deliver the life policy until released by telegram. On February 12th the policies were returned to the home office by such general agent, with the request that the accident and health policy be changed so as to rate the insured as a sheep owner instead of a sheep herder. The policies were returned to Mr. Dickerson on February 18th, and on Feb. 27th the defendant company wired him that the life policy might be delivered. In the meantime the soliciting agent, Girard, who resided at McCammon, Idaho, had severed his connection with the defendant, but the general agent, knowing that Girard was personally acquainted with the insured, sent the policy

to him. Girard received the same by regular mail, and, as stated by him, he made some effort to find the insured by inquiring of persons who knew him (the insured), and held the policy for several months. Finally, in September, 1915, at the request of the general agent, Girard returned the policy to him. Immediately on receipt of the policy, on the same day, Dickerson returned it to the home office, and the same policy was, on September 20th, returned from the home office to the general agent in Idaho with instructions to send the same to Largilliere Company, bankers, at Soda Springs, Idaho. It further appears that the insured died on August 14, 1915, at Ogden, Utah.

The defendant in its answer, denies the delivery of the policy, and alleges affirmatively that the deceased made false statements in his application for the insurance.

Trial was had before the court and a jury. At the close of the testimony the court instructed the jury peremptorily to return a verdict in favor of plaintiff for the full amount of the policy. From that judgment this appeal is taken.

The errors assigned are presented under two general heads, namely: (1) The exclusion of certain testimony and of letters received by the defendant and defendant's general agent, Mr. Dickerson, from Largilliere Company, bankers, of Soda Springs, Idaho, and the answers to such letters; (2) the exclusion of the testimony of the physician who attended the insured during his last sickness.

The correspondence excluded was offered to show an agency of Largilliere Company of the insured during his lifetime and after his death that Largilliere Company was the agent of plaintiff. It may be conceded as a self-evident proposition that if the policy was not in force August 14, 1915, the date of the death of the insured, no subsequent delivery could give it any validity. If it was not binding upon the defendant at that date, no act subsequently done could make it binding. The physical whereabouts of the policy is therefore immaterial, and whatever means taken by the plaintiff, or his agent, to get the actual physical possession of the policy after that date could in no way create any lia-

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bility on the part of the defendant. The policy was from that date only mere evidence. The exclusion, therefore, of any correspondence had between Largilliere Company and defendant after August 14, 1915, could not be prejudicial error.

The only communication or correspondence had between such bankers and the company prior to August 14, 1915, was a letter written to the defendant on March 4, 1915, which letter is as follows:

"On Dec. 4th, 1914, John Lombard of Firth, Idaho, paid to Geo. F. Girard who represented himself to be your agent, \$75.40 as a first premium, on a \$2,500 life policy. Dec. 5th his brother Jos. Lombard paid Mr. Girard \$83.78 in full for a \$2,500.

"The receipts are made out on your blanks signed Wm. H. Brown, Secy. These gentlemen have heard nothing from you or Girard since paying in the money. They have left the receipts with us and would very much like to have their money refunded. Please advise us how this can be done."

The defendant replied to that letter under date of March 11, 1915, and concerning this policy said:

"Replying to your favor of March 4th, I find that policy No. 48252 was issued on February 8th to Joseph Lombard, under date of December 5th, and sent to our branch office. The premium on this policy was \$83.78. * * * We are writing today to Mr. Dickerson, our general agent at Pocatello, asking him to follow up this case and ascertain what has become of policy No. 48252. * * * He will give this prompt attention and within a short time the matter will be straightened out. The agent who took the application is no longer in our employ and this accounts for the delay."

Both of these communications were excluded under objection that no agency had been shown on the part of Largilliere Company. Whether this correspondence would prove, or tend to prove, an agency or not, we cannot see how the defendant is prejudiced by its exclusion. In the communication of March 4th it is stated that nothing had been heard from the agent receiving the money, and that the receipts had been left with Largilliere Company, and that company informed

defendant that Lombard would like to have his money refunded. The secretary, in his reply, does not offer to return the premium, makes no statement that as soon as the whereabouts of the policy is ascertained the money will be refunded, but simply advises that he has written the general agent, and that the matter will be straightened up within a short time. So far as the record shows, the defendant made no effort at that time, or any subsequent time, to repay or refund the money which its agent had received as the first or annual premium on the policy. Had those two exhibits been admitted in evidence, the only fact that could have been established thereby would have been the request on the part of Largilliere Company for a refund of the money, and the failure on the part of the defendant to comply with that request. That could not prejudice the defendant.

It is also contended that, under the admitted facts as above outlined, there was never any delivery of the policy. The premium was paid on the date of the application; a receipt given stating that if the policy was subsequently issued it should be in force from that date; the policy was 3 issued and sent to the general agent and by him sent to Mr. Girard, who had been, but was not then, connected with the defendant, and retained by him for several months. Mr. Girard, it appears, was a friend and acquaintance of the insured, and made inquiries and an effort to locate the insured, but the insured's business kept him away from his home and out on the range with his flocks. Afterwards the policy was returned to the general agent and by him to the home office, and then no effort was made to retain or cancel it.

"It is the intention of the parties and not the manual possession of the policy which determines what constitutes delivery. Whatever the parties may have agreed to as a delivery, or whatever their conduct shows to have been considered a delivery, controls." Note to *Hartford Fire Ins. Co. v. Whitman* (Ohio), 9 Ann. Cas. 225.

In *Unterharnscheidt v. Missouri State L. Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743, it is said:

"It is next argued that the delivery of the policy to the company's agent is not a delivery to the insured person. It is quite obvious that this may or may not be true according to the circumstances under which

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the policy is placed in the agent's hands. If the premium is paid when the application is presented, and such application is approved and policy executed as of that date, and nothing remains but to deliver the paper to the insured, it may well be held that the sending of it to the agent to be by him given over to such insured person constitutes a sufficient delivery in law. To say the least, the neglect or omission of the agent under such circumstances to perform the manual act of placing the policy in the hands of the insured will not serve to suspend or postpone the obligation of the company upon its contract. In other words, delivery in law is not necessarily manual delivery."

See, also, note, 138 Am. St. Rep. 50.

Under the facts disclosed and the authorities, we are clearly of the opinion that it was the intention of the parties that the policy should be delivered and in force.

We have next to consider the contention that the district court erred in the exclusion of the testimony of the attending physician. The objection to the testimony of this witness was made under the provisions of Comp. Laws 4 1907, section 3414, as amended by chapter 109, Laws Utah 1911, the fourth subdivision of which is as follows:

"A physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

Defendant attempted to prove by the physician the condition of the insured at the date he first attended him, and also asked the direct question whether the insured was at that time afflicted with cancer; also as to whether he had operated upon the deceased during the time he was under the care of the witness. Objection to that line of testimony was sustained by the court, at which time the defendant's counsel stated that:

He "proposes to prove by this witness—will prove by this witness, if permitted—that the deceased died of cancer of the stomach and liver; that after he [witness] had ascertained that fact he thought it was due to the afflicted man to tell him of the serious condition and that he was incurable; and that after he [witness] had communicated this information to him, the patient, realizing his condition, wept and then voluntarily told this physician, without any

further inquiry upon his part, that he [insured] had been sick for two years suffering with his stomach and pains in his back. And this testimony, if permitted, would show that this was wholly voluntary, unsought for, and communicated by the party of his own free will and in connection with his realization of his incurable condition."

This offer to prove was objected to and, the objection being sustained, the ruling is assigned as error.

It is urged that the information which the insured gave to the attending physician was not privileged, as it was not "necessary to enable him to prescribe or act for the patient." Under the above statute, the question as to how or when the physician acquired the information sought to be proved is immaterial. If it was any information acquired while attending the patient which was necessary to enable the physician to prescribe or to act for the patient, then, under the statute, it would be privileged. The facts proposed to be proven, as shown by the offer made by defendant's counsel, are that the deceased died of cancer of the stomach and the liver. That, after the physician had ascertained the fact of the disease, he considered it due the afflicted man to tell him of the seriousness of his condition and that it was incurable, and that after that the deceased wept and then voluntarily told the physician, without any further inquiry, that he had been sick for two years suffering with his stomach and pains in his back. Under the authorities the question of the admissibility or inadmissibility of the foregoing proposed testimony, under statutes similar to ours, is not easily determined. This court has determined in common with many other authorities, that not all communications made to the attending physician are excluded under the provisions of the statute. *Madsen v. Light & Ry. Co.*, 36 Utah, 528, 105 Pac. 799. The fact that the deceased was afflicted with cancer could only become known to the physician while attending the patient, and was, of course, necessary to enable him to prescribe for him. The knowledge that the patient died of that disease would also be a matter the physician would ascertain from his treatment of the patient. Clearly such facts would be privileged as being information acquired while attending the patient.

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The further fact proposed to be proven by the physician that, after he had advised the insured that his condition was serious and his disease incurable, the insured thereupon voluntarily stated that he had been suffering with his stomach and pains in his back for two years, would not, 5 standing alone, without other aid or explanation, prove or tend to prove that the insured died of cancer, or prove the nature of the disease that caused the insured's death. There is no proof or offer of proof in the record, except the proof proposed to be given by the physician, that the insured had cancer, or that that disease caused his death, or of the nature of the disease or sickness that did cause his demise.

In addition, it must, we think, be accepted as a fact, universally recognized by not only the medical profession but by every one, that a physician, in attending or prescribing for a patient, of necessity ought to know and does know, and does ascertain for that purpose from his patient, the duration of the disease, which, of necessity, must aid him in determining the nature of the treatment to be given, the patient's strength or ability to undergo surgical operations or take other severe treatment, and the likelihood of such treatment proving beneficial or proving fatal, as it did in this case. Such would seem to be accepted as a matter of common everyday knowledge, and, as such, recognized and enforced by the courts. The fact as to whether the disease to be treated is chronic or acute—in other words, its duration—surely is a part of the information that every physician would want to know and would need to know in the intelligent discharge of his duties, to enable him to prescribe for and treat his patient. Whether the physician acquired the information, as above stated, from voluntary statements of the patient, or whether it was acquired from investigation or inquiry on his part, it would, nevertheless, be included within the information privileged under the section of the statute set out.

It follows from the above conclusion that there was no prejudicial error in the rulings of the court, and that the

judgment should be affirmed, respondent to recover costs. Such is the order.

McCARTY, CORFMAN, and THURMAN, JJ., concur.

FRICK, C. J.

I concur in the result. If, however, the conclusion of Mr. Justice GIDEON is based on the receipt which he has copied, alone, I cannot concur in the reasons stated by him. The defendant, in its answer, affirmatively averred: (1) That the policy sued on was not delivered at any time; and (2) that it was not delivered while the deceased was in sound health, as provided in the application of insurance which is made a part of the policy, and both of which the plaintiff produced in evidence at the trial. Upon the second question the defendant averred that the application, which was made a part of the policy, contained the following provision:

"I certify that all the statements and answers appearing herein and in Part II hereof are full, complete, and true, and agree that the insurance hereby applied for shall not take effect until the issuance and delivery of the policy and the payment of the first premium thereon while I am in sound health."

There is neither claim, pleading, nor proof on the part of the plaintiff that the foregoing provision was waived by the defendant, nor, as I understand counsel, is it contended that the receipt superseded the provision contained in the application which I have quoted. Indeed, plaintiff's counsel, in their brief, state the questions involved here thus:

"In our view, therefore, there are but two material questions of law involved in this appeal: (1) Was the policy in question delivered in February, 1915? (2) Was the information obtained by Dr. Worrell, while acting as the physician of the insured, privileged, and his testimony properly excluded, under the section and subdivision referred to?"

There can be no doubt that such a provision in the application, and especially if made a part of the policy, is valid and binding on both parties to the contract. 25 Cyc. 725, and

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cases there cited. Nor is there any doubt that such a provision may be waived by the company. Same vol., p. 730. It is also settled beyond dispute that the contents of the application and of the policy, if the application is made a part of the policy, constitute the contract of insurance. The contents of other papers may, however, be required to be considered in connection with the application and policy, if they were considered by the parties and are referred to in the policy or the application. Under such circumstances, all that is contained in all of the papers upon a particular subject must therefore be considered in determining the rights of the parties. If the receipt set forth in the opinion of Mr. Justice GIDEON is considered, it must be considered in connection with what is said in the application and policy with respect to how and when the insurance shall become effective, and neither party may rely solely on what may be contained in one of those papers. If that were not so, the insurer might impose additional conditions in the receipt upon the insured, which might defeat the insurance. When, therefore, there is a provision in the application which is made a part of the policy, as in this case, or in the policy and it is not averred that the provision has been waived or superseded, then the receipt, if any is issued, must be considered in connection with the contents of the application and of the policy. In this case, therefore, I think the defendant had a right to insist that the policy did not become effective for two reasons: (a) Because it was not delivered to the insured; and (b) for the reason that, if it was delivered to him, he was not in sound health at such time, as provided in the application. And I think that the defendant has a right to have the judgment of this court upon both of those propositions. In my judgment, however, the evidence is sufficient to justify the conclusion that the policy was intended to be, and in fact was, delivered within the purview of the law; and I am further of the opinion that the evidence is insufficient to justify a finding that the deceased was not in sound health when the delivery of the policy was made, as just stated. Those two

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propositions must therefore be determined against the contention of the defendant.

Whether the district court erred in not permitting the doctor to testify on behalf of the defendant for the reasons stated in the opinion of Mr. Justice GIDEON I am in doubt. The question, under our decisions, is a very close one. In view, however, that my associates are of the opinion that the ruling of the district court upon that question was right, I defer to their judgment.

For the reasons stated, therefore, I concur in the affirmance of the judgment.

COBURN v. BARTHOLOMEW

No. 3010. Decided August 9, 1917. Rehearing denied October 4, 1917.
(167 Pac. 1156.)

1. **PUBLIC LANDS—ENTRY—ASSIGNMENT—VALIDITY.** Act Cong. March 28, 1908, c. 112, section 2, 35 Stat. 52 (U. S. Comp. St. 1916, section 4682), providing that no assignment of entry should be allowed except to a person qualified to make entry, does not invalidate the contract of an entryman to convey the land upon which he entered, after due proofs were completed. (Page 570.)
2. **PLEADING—MOTIONS—JUDGMENT ON PLEADINGS—EFFECT AS DEMURRER.** While a defendant's motion for judgment on the pleadings is not strictly proper, such motion may be treated as a general demurrer. (Page 570.)
3. **VENDOR AND PURCHASER—RECOVERY OF MONEY PAID—PLEADING.** In suit for money deposited to secure payment by the vendee of land under the entryman's agreement to sell it as soon as proofs were completed, unless it appeared in the agreement or on the face of the complaint that plaintiff was not qualified to make an entry of land, the complaint was not subject to general demurrer. (Page 570.)
4. **VENDOR AND PURCHASER—FAILURE OF CONSIDERATION—RIGHT TO RECOVER.** Where defendant agreed to convey land entered by him to plaintiff when proofs were completed, and to deposit a share of an irrigation company to insure plaintiff's being able to secure water, there was no basis for contention that plaintiff purchased the water share outright, when defendant, through his own fault, failed to complete the entry. (Page 571.)
5. **VENDOR AND PURCHASER—RECOVERY OF PRICE—FORM OF REMEDY.** Under Comp. Laws 1907, section 3498, providing there can be but

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one action for recovery of any debt secured by mortgage, which action must be in accordance with this chapter, and further providing for the sale of the mortgaged property, where plaintiff agreed to buy land and paid half of the price which defendant secured by depositing in escrow a share in an irrigation company, and defendant who had entered the land failed to complete the entry, plaintiff's remedy to recover the money paid, was by foreclosure on the share in escrow, and not by action for damage for breach of contract.¹ (Page 572.)

6. APPEAL AND ERROR—DETERMINATION—NECESSITY OF REMAND. Though judgment of the trial court was right as to the amount, it cannot be affirmed without remand where plaintiff adopted the wrong form of action, by suing for damages instead of proceeding to foreclose his lien for the debt on stock standing in plaintiff's name in escrow in a bank. (Page 572.)

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by J. W. Coburn against Vern Bartholomew.

Judgment for plaintiff. Defendant appeals.

REMANDED with instructions.

Wm. B. Higgin for appellant.

Willey & Willey for respondent.

THURMAN, J.

On the 31st day of March, 1910, at Burtner, Millard County, this state, plaintiff and defendant entered into a written agreement in words and figures as follows:

"This memorandum witnesseth that John W. Coburn agrees to purchase at the price of (\$1,600) sixteen hundred dollars, the following described real estate situated in the county of Millard, state of Utah, to wit: The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 6, T. 17 S., R. 6 W., S. L. M., and Vern Bartholomew agrees to sell said premises at said price and to convey to John W. Coburn, said purchaser, a good title thereon, subject to final proof and (25) twenty-five shares of water in the Mel-

¹ *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510; *Boucofski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898.

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ville Irrigation Company. Said land is desert land, and before final proof can be made said land will have to be irrigated, and said Coburn agrees to irrigate said land so proof can be made. And pending this proof V. Bartholomew agrees to have a water certificate made in the name of John W. Coburn and place in the State Bank of Millard County at Fillmore as security for the money paid, and when final proof is made Bartholomew agrees to make a deed and place in the bank in escrow with the water stock before second payment is made. These payments upon said land are to be made as follows: (\$800) eight hundred dollars down, the receipt of which is hereby acknowledged, (\$400) four hundred dollars in one year from date, and (\$400) four hundred dollars in two years from date at 7 per cent. interest on deferred payments, interest payable annually."

In pursuance of said agreement plaintiff paid the defendant the said sum of \$800, and the defendant caused a certificate of stock in the Melville Irrigation Company, a corporation, to be made in the name of the plaintiff, and placed the same in the bank referred to in the agreement. Plaintiff afterwards, during the month of May, 1910, entered into possession of said land and irrigated the same, and during the year 1910 was compelled to pay, and did pay, \$100 as an assessment levied on said stock. In September of the same year defendant made and filed in the General Land Office of the United States his final proof for patent for said land to the effect that he had complied with the laws of the United States and the regulations of the land department in all respects relating to desert land entries, and at the same time, as part of said final proof, made affidavit to the effect that he was the sole owner of said land, and that no other person possessed any interest therein. Defendant afterwards filed in said land office another affidavit in which he stated that in March, 1910, he had sold to plaintiff a portion of said land, and had also sold another portion of said entry to one Selman. The defendant's application for patent was suspended, and he thereupon relinquished the same. Shortly afterwards his wife, Emma Bartholomew, entered the same tract of land and was in pos-

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session thereof at the date of the trial. At the time the written agreement was entered into, as before stated, defendant was in possession of said land under a desert land entry made in 1906, and as far as the evidence discloses, at the time said written agreement was entered into said entry was in good standing. After the failure of defendant's application for patent and his relinquishment thereof and entry by his wife, Emma Bartholomew, plaintiff demanded of defendant that he return to plaintiff the \$800 paid defendant at the date of said written agreement, and interest thereon, and also demanded the said sum of \$100 paid by plaintiff as assessment on said water stock. The defendant refused to pay the same or any part thereof. The foregoing, in substance, are the material facts found by the court, and likewise the material matters covered by the pleadings. Both the complaint and the answer contain other allegations, but in view of the findings of the court and the assignment of errors they are immaterial. The case was tried to the court without a jury, and judgment rendered for plaintiff for the sum of \$900. Defendant appeals.

At the beginning of the trial, and before any evidence was introduced, defendant moved for judgment on the pleadings, which motion was overruled. That ruling of the court constitutes appellant's first assignment of error. He also assigns as error the judgment rendered by the court because, as defendant contends, the sums awarded by the court were paid by plaintiff for the purchase of the water stock and for the assessment thereon. It is also assigned as error that the judgment is contrary to law. These assignments constitute the issues presented by this appeal.

Under the first assignment of error, and by his brief filed herein, appellant contends that the court erred in overruling his motion for judgment on the pleadings for the reason, as he says, "the complaint showed on its face that it did not state facts which, if proved, would entitle the plaintiff to judgment against the defendant." The reasons assigned by appellant for this contention are:

"The complaint showed a contract entered into which was contrary to law and could not be enforced, and sought to recover damages for its breach."

In support of his position appellant relies upon section 2 of the act of Congress published in 35 Stat. L. U. S. p. 52 (U. S. Comp. St. 1916, section 4682), which reads 1 as follows:

“That from and after the date of the passage of this act no assignment of an entry made under said acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said act, of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.”

It is quite manifest to the court that the section of the statute just quoted has no application to the facts of this case. That section was evidently intended to meet a case where an entryman assigned all or a part of his entry to an individual upon the understanding or expectation that the 2, 3 assignee would, in his own name, make final proof for patent. In that case, in order to guard against fraud and the issuance of patent to one not entitled thereto, the law requires that before such assignment will be allowed or recognized it must be shown that the assignee is qualified to make a desert entry. Whether the assignment itself should on its face show such qualification, or whether the fact may be shown by evidence aliunde, need not be determined in this proceeding, for, as before stated, the law has no application to a case of this kind. The written agreement in this case is not an assignment of the land in question. At most it is only an agreement, on certain conditions, to convey the land in the future. We are unable to see wherein the agreement in question contravenes either the letter or the spirit of the law above quoted and relied on by appellant. This question is raised by defendant on a motion for judgment on the pleadings. Such a motion is not usual on the part of a defendant unless it be where a defendant's counterclaim is either admitted or not denied, in which case his relation to the question is that of a plaintiff. A motion for judgment on the pleadings is essentially a proceeding on the part of a plaintiff. 23 Cyc.

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769. But waiving the propriety of technical procedure the motion may be treated as a general demurrer and be governed by the rules applicable thereto in determining the effect of appellant's motion. We have not set out the complaint in *hæc verba* for the reason that the only point made against it arises on the face of the written agreement which we have quoted at length at the beginning of this opinion. The question therefore is: does the agreement show on its face anything contrary to law from which it can be concluded that the complaint does not state a cause of action, or that plaintiff is not entitled to any relief because of the illegality of the transaction? Unless it appears on the face of the agreement, or somewhere else in the complaint, that plaintiff is not qualified to make a desert entry, we cannot conceive how a general demurrer on the ground of illegality in the transaction can be sustained. In the case at bar we feel justified in holding that the trial court did not err in denying appellant's motion, hence the first assignment should fail.

As to the second assignment of error the case, if possible, is more clear that the judgment of the trial court was right. Under this assignment appellant contends that, so far as the water stock is concerned, plaintiff purchased it outright for the sum of \$800; that the stock thereby became his; 4 and that the payment of the \$100 assessment was for the protection of his own stock, as to which appellant had no concern. This position is so utterly untenable from every point of view that its deliberate assertion, if not absolutely astounding, is, at least, a matter of surprise. Appellant, as will be seen, entered into an agreement to sell respondent the land in question, subject to acquiring title from the government. By the same instrument he agreed to convey to plaintiff a water right for the land, all for the sum of \$1,600, \$800 of which was to be paid at the time the agreement was made and the remainder later. Pending the final proof for patent defendant was to place the water stock in the bank agreed upon in the plaintiff's name as security for the money paid. Without any fault of plaintiff, but by the default of defendant himself, defendant failed in his final proof for patent. He could not, therefore,

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convey to plaintiff, and the agreement failed of complete consummation. Plaintiff seeks return of the money paid for the payment of which the water stock in escrow became a mere security under the express agreement of the parties. There is no merit in this assignment.

The third and last assignment has already been disposed of, and need not be further considered.

Respondent has cited many authorities relating to the effect of illegal transactions between parties where one party is less culpable than the other, but the view we have taken of the transaction between plaintiff and defendant in the present case renders it unnecessary to review the authorities so cited, as they are not pertinent to our view of the case.

The judgment of the trial court as to the amount to which the plaintiff is entitled is right, but this court is powerless to affirm the judgment without remanding the cause to the trial court for further proceedings. Plaintiff, in his case, did not adopt the proper form of action. The action 5, 6 should have been for a foreclosure, because the obligation, as we have seen, by express agreement, is secured by property standing in the plaintiff's name in escrow in the Fillmore bank. To affirm this judgment without requiring the plaintiff to first proceed against the fund or property set apart for that purpose, especially as it stands in plaintiff's name, would be to give plaintiff an unfair advantage and probably lead to further litigation in order to determine the rights of the parties. This question has given us more concern than any other question in the case. Comp. Laws 1907, section 3498, in part, provides as follows:

"There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter," etc.

The section then provides for a sale of the mortgaged property according to the provisions of law relating to sales on execution. Respondent's contention that he was not, in this case, compelled to foreclose his lien upon the water stock is in contravention, not only of the express language of the statute

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we have quoted, but the decisions of this court heretofore rendered. *Bacon v. Raybould*, 4 Utah, 357, 10 Pac. 481, 11 Pac. 510; *Boucofski v. Jacobsen*, 36 Utah, 165, 104 Pac. 117, 26 L. R. A. (N. S.) 898. Inasmuch, however, as this case has been tried in its present form without objection and judgment rendered, which, as to amount, in the opinion of this court, is just and equitable, it is the opinion of the court that the case should be disposed of with as little expense and inconvenience as possible, at the same time safeguarding the rights of both parties to the action. The cause is therefore remanded to the trial court, with directions to recast the pleadings and make findings of fact and conclusions of law in accordance with the views herein expressed, and enter a decree of foreclosure in favor of the plaintiff for the amount of the judgment found by the trial court, and for a deficiency judgment as provided by law in cases of foreclosure. Neither party to recover costs on appeal.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

DERRICK v. SALT LAKE & OGDEN RY. CO.

No. 3003. Decided October 12, 1917. (168 Pac. 335.)

1. TRIAL—INSTRUCTIONS—QUESTIONS FOR JURY. Where the court granted motion for nonsuit in an action by an automobile passenger against a railroad on counts alleging negligent dangerous speed and failure to give warning, it was error thereafter in the charge to submit such questions to the jury. (Page 579.)
2. NEGLIGENCE—INJURIES TO TRAVELERS—JOINT ADVENTURE—IMPUTED NEGLIGENCE. Where the undisputed evidence showed that plaintiff and the owner of an automobile agreed upon a trip in which they were to share expenses equally, and the automobile was struck by a train, it was error to instruct that plaintiff was a passenger, but he was a joint adventurer, and as such the negligence of the owner of the car in driving it upon the track was imputed to him.¹ (Page 579.)

¹ *Atwood v. Railway Co.*, 44 Utah, 366, 140 Pac. 137; *Martindale v. O. S. L. R. Co.*, 48 Utah 464, 160 Pac. 275.

Derrick v. Salt Lake & Ogden Ry. Co., 50 Utah 573

Appeal from District Court, Third District; *Hon. M. L. Ritchie*, Judge.

Action by Alfred S. Derrick against the Salt Lake & Ogden Railway Company.

Judgment in part for plaintiff. Defendant appeals.

REVERSED and new trial ordered.

Boyd, DeVine & Eccles for appellant.

Joseph R. Haas for respondent.

STATEMENT OF FACTS

Plaintiff brought this action to recover from defendant damages alleged to have been sustained because of its negligence. The defendant, hereafter called company, is a Utah corporation, and, at the time of the acts of negligence alleged in the complaint, owned and maintained an electric inter-urban railway system between Salt Lake City and Ogden, Utah. The facts of the case as disclosed by the record are about as follows:

Plaintiff, with two companions, George J. Merritt and A. W. Leggett, who were traveling salesmen, on June 7, 1915, were traveling northward along the public highway leading from Salt Lake City to Ogden in an automobile owned by Merritt, who was acting as chauffeur. They were on a business trip, each representing a different line. Leggett's destination was Ogden, where he intended to leave his companions. Plaintiff and Merritt expected another man to join them at Ogden and to continue the journey through Northern Utah and into Idaho. It was understood by and between plaintiffs, Merritt and Leggett, that the expenses of the trip would be prorated and paid jointly by them. Plaintiff testified that he "did not have any jurisdiction or control over Mr. Merritt"; that he "was a guest in his car."

The question as to whether the relations of these parties were contractual or merely social must be determined by the agreement, if any, express or implied, under which they were

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traveling together, and not by the individual conclusions of the plaintiff in that regard. On this point plaintiff further testified, in part, as follows:

“Q. You were expecting to travel together (meaning with Merritt) through Idaho and other places in company? A. Yes, sir. Q. What were your arrangements as to the method in which you were to travel? A. We had not made any arrangements before, but of course it is customary to stand your portion of the expenses. We never discussed that portion of the matter. Q. You mean the cost? A. The cost of the trip. Q. The cost of the machine? A. Not exactly the machine; the expenses of the trip. Q. Had you included gasoline? A. Gasoline, oil, and tires. Q. Wear and tear on the car? A. Yes, sir. Q. And other expenses connected with the trip? A. With the trip other expenses; yes, sir.”

Merritt, the owner of the car, and who, as it will appear later on in this opinion, was as much interested in the bringing of this suit and the successful prosecution thereof as the plaintiff himself, testified, in part, as follows:

“Q. What was the arrangement about expenses, how much passage money or what? A. There was no arrangement. It is a clearly understood fact that the boys pay their share. Q. What do you mean by that? You are furnishing the car and as part consideration for their passage they paid a certain amount of the expenses? A. Yes, sir. Q. That it had been the custom to do that in prior years? A. Yes, sir. That is, whenever he, or any one else went with me, it is a customary manner with traveling men. Q. You regarded, however, didn't you, Mr. Merritt, that these gentlemen were traveling with you and paying the expenses as part of—that they would pay their portion of the expenses with you? A. Why, it has always been customary for every one else to pay for part of the expenses. * * * Q. Who arranged this particular trip? A. Well, I think the arrangements were equal. That is, they were mutual among all of us. Mr. Leggett was only going as far as Ogden, and Mr. Derrick was going on up to Idaho. * * * There was another gentleman that was meeting us in Ogden; he was also going. * * * When we started we had

agreed to take lots of time and not drive fast. We discussed this on the way going out."

We shall again refer to this evidence later on.

The company's line of railroad passes through the town of Farmington, which is north of Salt Lake City. The public highway along which plaintiff and his companions were traveling on the occasion in question crosses the company's line of railroad at a point about one-half mile north of a station known as Lagoon. The railroad tracks, two in number, approach the highway so that the highway and railroad tracks form an angle of forty or forty-five degrees. The railroad tracks, from the point where they intersect the highway, extend south several hundred feet through a cut ten or twelve feet deep. The lands immediately south of the highway and adjoining the company's right of way on the east are separated from the right of way by a fence. There is a stone house about 275 feet south of the crossing and about twenty-five feet east of the railroad tracks and near the boundary line of the right of way. At the time plaintiff and his companions were traveling along the highway on the date mentioned (June 7, 1915) the ground, on the east of the right of way and between the stone house and the crossing, was covered by a heavy growth of underbrush and weeds. The railroad track from Lagoon Station north to the crossing is on about a one per cent. up grade; and the highway from a point about 150 feet east of the railroad track to the crossing is on a gradual and a uniform down grade. Looking west along the highway from the point where the down grade begins the railroad crossing is in plain view.

Plaintiff and his companions passed through the town of Farmington and arrived at the crossing at about five thirty p. m. on the date mentioned. Merritt and Leggett were in the front seat and plaintiff was in the rear seat of the automobile. Plaintiff testified that when they came within sight of the crossing his attention was divided between the reading of a letter and looking out for approaching trains; that when they came in sight of the crossing and started on the down grade, he spoke to his companions and "cautioned them to be

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careful"; that "it was after starting down the incline that I started to put my attention on the road. I imagine we were about forty or fifty feet * * * south of the railroad track. I was listening."

Leggett, who was plaintiff's witness, testified in part as follows:

"We were close to the railroad track when I heard the bell ringing, possibly fifteen or twenty feet away. When I heard the bell ringing I understood that a train was coming. My best judgment is that we were fifteen or twenty feet from the track at the time * * * traveling about ten miles an hour. The automobile didn't stop. It kept right on going and turned up the railroad track."

The evidence, without conflict, shows that when the automobile arrived at the crossing Merritt, the driver, turned it north on the railroad track, and when it had moved along the track about ten feet and "was just north of the crossing it was hit" by a northbound train and practically demolished. Witnesses, both for plaintiff and defendant, testified—in fact the evidence, without conflict, tends to show—that if Merritt, when he came to the crossing, had continued "straight ahead instead of turning north onto the railroad track," he would have cleared the crossing without colliding with the train.

Plaintiff was severely injured in the collision, hence this suit. One cause of action is to recover damages for the personal injuries suffered by plaintiff in the collision, and the other cause of action is based on a claim made by Merritt against the company for the value of the automobile, which claim was duly assigned to plaintiff. The cause was tried to a jury who returned a verdict on the first cause of action in favor of plaintiff and assessed his damages at \$900; and on the second cause of action, which was based on the assigned claim for the value of the automobile, the verdict was in favor of the company, no cause of action. The jury, by their verdict, found, and there is abundant evidence to support the finding, that Merritt was guilty of contributory negligence. From the judgment on the verdict the company only appeals,

hence no further reference will be made to the second cause of action.

McCARTY, J. (after stating the facts as above).

The alleged acts of negligence upon which respondent bases his right to recover are summarized in his complaint as follows:

“(a) In running said train as it approached said crossing and onto said crossing at a high and dangerous rate of speed, to wit, at the rate of at least thirty-five miles per hour.

“(b) In not giving any warning or signal of the approach of said train to said crossing, either by bell or whistle or otherwise, until said train was almost upon said crossing and plaintiff was in a position of peril and it was impossible for either plaintiff or defendant to avoid a collision.

“(c) In not having said train under control so that the same could be stopped in time to avoid a collision when plaintiff was discovered or seen by defendant in a position of peril on or near said crossing.

“(d) In running said train at a rate of speed in excess of that fixed by the ordinance of Farmington city.”

The company denied the alleged negligence pleaded in the complaint and, as an affirmative defense, pleaded contributory negligence on the part of plaintiff and Merritt.

When plaintiff's evidence was in and he had rested his case in chief, the company moved the court for a nonsuit on the ground that the evidence failed to show negligence in any of the particulars enumerated in the complaint. The court sustained the motion in part and denied it in part. In ruling on the motion the court said:

“The motion will be granted as to paragraphs (a) and (b) above mentioned, but the court will submit the other two allegations of negligence to the jury, and the motion will be denied for that reason.”

The allegations of negligence in paragraphs (a) and (b) were thus as completely eliminated from consideration as they would be if the court had stricken them. Neither the evidence produced by the company nor that introduced by the plaintiff in rebuttal tended in any way to show that the company was

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negligent in any of the particulars enumerated in paragraphs (a) and (b) of the complaint. The court, nevertheless, submitted the issues presented by paragraphs (a) and (b) and the company's answer thereto to the jury.

The court, after stating the issues presented by the pleadings, charged the jury, in part, as follows:

"If you believe from a preponderance of the evidence that the injury occurred as alleged in the complaint at a crossing where a highway crosses the defendant's railroad, and that the defendant did not give any warning of the approach of the train which collided with the plaintiff and the automobile in which he was riding, or did not give any warning of its approach in time to enable the plaintiff to avail himself of it, that would be negligence upon the part of the defendant."

The company excepted to this instruction and assigns the giving of it as error. Counsel, with much earnestness, contend that the giving of the instruction was 1 prejudicial error. In the course of the printed argument they say:

"The defendant was induced to rely [which it had a right to do] upon the court's ruling and could not anticipate that the court was, nevertheless, going to instruct the jury that the very grounds of negligence which he expressly stated would be withdrawn from the jury, were nevertheless grounds of negligence which they might consider."

The court, by granting the motion for a nonsuit as to paragraphs (a) and (b) of plaintiff's complaint, in effect, held that the negligence alleged in those paragraphs was not sustained by evidence. The defendant, therefore, was not required to introduce evidence to refute these allegations. They were, as we have stated, in effect, eliminated from the case. The court therefore erred in charging the jury in relation to them.

Defendant requested the court to submit to the jury by proper instructions the question of whether or not there was an understanding between Merritt, the owner and driver of the automobile, and the plaintiff, that "they were to jointly bear the expense of the automobile trip," etc., 2

and if the jury should find from the evidence that there was such understanding between them, the negligence, if any, of Merritt, in driving the automobile at the time of and immediately prior to the accident, would be attributed to plaintiff. The court refused to so instruct the jury, but charged them on the theory that the relation of carrier and passenger existed between Merritt and the plaintiff. This was error. The undisputed evidence shows that the automobile trip was a joint affair in which Merritt and plaintiff were mutually and equally interested, and in which their rights to direct and govern the conduct of each other in relation thereto were coextensive. Each had a voice and the right to be heard in regard to the details of the trip. Merritt testified that "the arrangements were equal; that is, they were mutual among us all." He further testified: "When we started we had agreed to take lots of time and not drive fast. We discussed this on the way out," and that "it was clearly understood" that each would pay his share of the expenses of the trip. Plaintiff testified that costs of the trip included gasoline, oil, tires, "wear and tear on the car, and other expenses connected with the trip."

The contractual relations of plaintiff and his traveling companions were substantially the same as they would have been if they had jointly hired an automobile with which to make the trip, with the understanding that they would jointly pay the expenses and mutually and concurrently direct the journey and the details thereof. The trip was therefore a joint enterprise in which these parties had a community of interest and in which they all equally had a voice and a right to be heard respecting the details of the journey. Under these circumstances the negligence of Merritt in the management of the automobile at the time of the collision was imputed to plaintiff. 23 Cyc. 1015. We also invite attention to *Atwood v. Railway Co.*, 44 Utah, 366, 140 Pac. 137, a case in which the question under consideration is involved and quite elaborately discussed. What is there said is reaffirmed by this court in *Martindale v. O. S. L. R. Co.*, 48 Utah, 464, 160 Pac. 275.

Appeal from Box Elder County, First District

Under the law applicable to the admitted facts defendant would have been entitled to have the jury instructed, if it had so requested, that if they should find that Merritt was negligent, such negligence, as a matter of law, would be imputed to plaintiff.

The judgment is therefore reversed, and a new trial ordered. Costs to appellant.

FRICK, C. J., and CORFMAN, THURMAN, and GIDEON, JJ., concur.

PACIFIC LAND & WATER CO. v. HARTSOUGH

No. 3069. Decided October 15, 1917. (168 Pac. 552.)

1. ADVERSE POSSESSION—NECESSITY OF OCCUPATION, USE, AND INCLOSURE. Whether a tax deed to the south half of a section, a few acres of which defendant had inclosed, occupied, and cultivated, was color of title or not, defendant acquired no title by adverse possession to the land outside of his inclosure, where no part of it was inclosed by a substantial fence, or otherwise, or occupied or used.¹ (Page 584.)
2. ADVERSE POSSESSION—ELEMENTS OF ADVERSE POSSESSION. Where defendant and his predecessors had been in actual, open, and adverse possession of a few acres of land since about the year 1899, and for seven successive years had paid taxes thereon, and they were inclosed, occupied, and cultivated, title was acquired by adverse possession. (Page 584.)

Appeal from District Court, First District; *Hon. J. D. Call*, Judge.

Action by Pacific Land & Water Company against Albert E. Hartsough.

From a decree for plaintiff for part of the relief sought, defendant appeals; and from so much of the decree as is in favor of the plaintiff brings a cross appeal.

AFFIRMED.

Nebeker, Thatcher & Bowen for plaintiff.

George Halverson for defendant.

GIDEON, J.

¹ *Central Pac. Ry. Co. v. Tarpey*, 51 Utah —, 168 Pac. 554.

Plaintiff seeks to quiet title to the south half of Sec. 35, Tp. 15 N., R. 13 W., S. L. M., in Box Elder County. Defendant denies plaintiff's ownership, and claims the title, possession, and right of possession by reason of adverse occupancy under color of right and the payment of taxes for more than seven years. Defendant asks for a decree quieting his title. Trial was before the court. Findings were made from which it appears that the lands in question are a part of the lands granted by the government to the Central Pacific Railroad Company; that a patent issued to that company for said premises September 5, 1896; that by mesne conveyances the legal title to the premises was, at the date of the institution of suit, in the plaintiff. The court further found that in 1884 or 1885 a fence was constructed inclosing approximately eight acres of the southeast quarter of said section, and that about the year 1899 O. L. Ryan entered into the actual possession of the land within said inclosure, and from that time on the said O. L. Ryan and his grantees, the defendant being the last, had the actual possession of all of the land inclosed within such fence, but prior to the year 1910 no other part of said half section was inclosed, occupied, used, or cultivated by the defendant or his predecessors, but that the part so inclosed was occupied, used, and cultivated, and that such possession of the part inclosed since 1904 had been held adverse to all the world and against the plaintiff and its predecessors; that neither the plaintiff nor any of its predecessors had been in possession of any part of the premises within such inclosure since the year 1899. The court further found that in the year 1898 said section 35 was assessed by the county assessor of Box Elder County, where said land is situated, to the Durham Land & Cattle Company and that the said taxes so levied were not paid, and on February 6, 1899, the section was sold to Box Elder County for delinquent taxes and a tax sale certificate issued therefor to such county; that thereafter, on October 31, 1900, the said O. L. Ryan paid to Box Elder County one-half of the taxes assessed against said section and the cost of sale and received from the county auditor an assignment of the tax sale certificate aforesaid;

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that the south half of the section was not redeemed from such tax sale, and on the 29th day of January, 1904, the said O. L. Ryan received a tax deed from the county clerk of that county for the south half of that section; that on the date of the receipt of said tax deed, and prior thereto, the said Ryan was in possession of that part of the south half of said section within the inclosure, but was not in the actual possession of any other part of said land; that for the years 1900, 1901, 1902, and 1903 said section was assessed to George W. Emery, who then held the legal title, and all said taxes were paid by him; that in the year 1904 the said section was again assessed to said Emery and the taxes were paid by him, but in that year the south half of the section was also separately assessed to O. L. Ryan and said taxes were paid by him; that during the years 1905, 1906, 1907, and 1908 the entire section was assessed to Emery and the south half of said section was also in each year separately assessed to O. L. Ryan, and the taxes were paid by each of said parties on the lands so assessed to them for each of said years; that for the years 1909 and 1910 the south half of the section was assessed to Ryan, but was not assessed to Emery, and for the years 1911 and 1912 said south half of said section was assessed to the defendant Hartsough and was not assessed to Emery. The defendant Hartsough has title by mesne conveyance from said O. L. Ryan.

From the findings of fact the court made conclusions adjudging the plaintiff to be the owner of all of the south half of said section except such part as is within the inclosure, approximately eight acres, and adjudged that the plaintiff should repay to the defendant all amounts paid by him or his predecessors as taxes upon said premises, and, as further conclusions of law, that the defendant Hartsough was the owner of the premises within such inclosure, which are described in the findings. Decree was entered accordingly. From that judgment, except the part adjudging the defendant to be the owner of the premises within the inclosure, Hartsough appeals to this court.

The defendant, in his answer, seems to rely upon occupancy adverse to the plaintiff without basing his right upon any paper title. However, at the trial the tax deed mentioned in the findings was admitted in evidence, and the court made findings thereon and as conclusions of law de- 1
termined that the tax deed was void, and gave no right to the defendant thereunder. That is assigned as error. The court made further findings that at no time prior to the year 1910 had the defendant or his predecessors inclosed by substantial fence or otherwise, or occupied or used, any part of the premises except such as was inclosed. By reason of such findings the admission of that deed in evidence, and the conclusions deduced therefrom, become immaterial, whether the deed created color of title or not. The conclusions reached by this court in *Central Pac. Ry. Co. v. Tarpey*, 51 Utah, —, 168 Pac. 554, decided at this term, is, in view of the court's findings aforesaid, decisive of this case, and on the authority of that case the rulings of the district court assailed by the defendant must be affirmed.

Plaintiff cross-appeals from that part of the decree adjudging defendant Hartsough the owner of the premises within the inclosure, consisting of about eight acres of land, and also from that part of the judgment restraining it from making any claim of right or title to said 2
premises or any part thereof. The finding of the court that the defendant and his predecessors have been in actual, open, and adverse possession of those particular premises since about the year 1899 is supported by the evidence, and the record discloses that during seven successive years of that time defendant and his predecessors paid the taxes assessed against the premises. The court did not, for that reason, err in adjudging the defendant to be the owner of such premises inclosed. There is substantial evidence in the record to support all of the court's findings.

It follows from the foregoing that the judgment of the district court should be affirmed. Such is the order. Neither party to recover costs on this appeal.

FRICK, C. J., McCARTY, CORFMAN, and THURMAN, JJ., concur.

Appeal from Salt Lake County, Third District

ELEGANTI v. STANDARD COAL CO.

No. 2989. Decided October 15, 1917. (168 Pac. 266.)

1. **TRIAL—INSTRUCTIONS—PROVINCE OF JURY—UNCONTESTED FACTS.** Where in an action for the death of a mine employee it appeared without dispute that explosive gas was found in defendant's mine on one occasion about two months prior to the death, the court properly told the jury that defendant's mine was a mine known to generate explosive gases, instead of submitting that question to the jury. (Page 587.)
2. **MASTER AND SERVANT—DUTY OF INSPECTION—STATUTORY REGULATIONS.** Comp. Laws 1907, section 1518, subd. 3, as amended by Laws 1913, c. 78, requiring mines known to generate explosive gases to be examined every morning, applied to a mine in which explosive gases were discovered on one occasion, whether or not they existed in the mine in sufficient quantity to make it unsafe or dangerous in the opinion of experts. (Page 589.)
3. **TRIAL—REFUSAL OF REQUESTS COVERED BY CHARGE GIVEN.** A requested instruction which was sufficiently covered in the court's general charge was properly refused, especially where it stated some propositions too favorably to defendant and others too strongly against plaintiff. (Page 591.)
4. **NEW TRIAL—EXCESSIVE DAMAGES—REMITTITUR INSTEAD OF NEW TRIAL.** In an action for death, the amount of damages is largely within the judgment of the jury, and the mere fact that the verdict is excessive is not sufficient to show passion or prejudice so as to require a new trial instead of a remittitur of the excess. (Page 592.)
5. **APPEAL AND ERROR—NEW TRIAL—EXCESSIVE DAMAGES.** Whether a new trial should be granted for excessiveness of the damages is largely in the discretion of the district court, and the Supreme Court ordinarily possesses no power other than that of determining whether the trial court has abused its discretion. (Page 592.)

Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by A. Eleganti, as administrator of the Estate of Giacomo Boetto, Deceased, against the Standard Coal Company.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

A. R. Barnes and *E. V. Higgins* for appellant.

Weber & Olson for respondent.

FRICK, C. J.

The plaintiff, as administrator of the estate of Giacomo Boetto, deceased, brought this action to recover damages caused by the death of said Boetto, who was an employee of the defendant company, and whose death, it is alleged, was caused through the negligence of the defendant while the deceased was employed in the coal mine of the defendant in November, 1914. The action was based on our statute (Comp. Laws 1907, section 1518, subd. 3, as amended by chapter 78, Laws Utah 1913, p. 122), which reads:

“In all mines known to generate explosive gases, the mine foreman, or fire bosses, shall make a careful examination every morning of all working places and traveling ways, and all other places which might endanger the safety of the workmen, within three hours prior to the time at which the workmen shall enter the mine. Such examination shall be made with the safety lamp.”

In the complaint it is, in substance, alleged that defendant's mine was “known to generate explosive gases”; that defendant had failed and neglected to comply with the provisions of the statute in failing to make a proper or any examination or exploration of the mine for explosive gases. The facts in that regard are fully set forth. It is alleged that the deceased was injured by an explosion of gases in defendant's mine, and that such injuries caused his death, all of which were the result of the omissions and negligence as aforesaid. The defendant, in its answer, denied all acts of negligence; denied that the mine in question was known to generate explosive gases; denied that plaintiff's intestate died from the effects of the explosion of gases in its mine, and, as an affirmative defense, averred that the deceased, at the time he was injured, was at a place in the mine where he had no right to be, and that his injury and death were caused by reason of his own negligence. It is also set up as an additional defense that the deceased had assumed the risk of injury. The cause was submitted to a jury, which returned a verdict in favor of the plaintiff. After modifying the verdict, as hereinafter shown, judgment was entered on the verdict, and the defendant appeals.

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The defendant insists that the district court erred: (1) In its charge to the jury; (2) in excluding certain evidence offered by the defendant; (3) in refusing certain requests to charge asked by the defendant; and (4) in not granting the defendant a new trial.

The two propositions first stated raise what seems to be the only important question in the case. With respect to whether the mine in question was one known to generate explosive gases the court charged the jury:

"The court instructs you that it appears from the undisputed evidence that the defendant's mine was a mine known to generate explosive gases."

In the same charge the court also instructed the jury that no examination for such gases was made as provided by the statute. Defendant's counsel excepted to that part of the charge we have quoted, and they now insist that the court erred in so charging the jury. They contend that the question whether defendant's mine was or was not a mine known to generate explosive gases should have been submitted to the jury as a fact to be found, and should not have been determined by the court as a matter of law. No doubt the question of whether defendant's mine was one which was known to generate explosive gases or not was a question of fact. But if there was no dispute respecting that fact, the court did not commit error by declaring the fact to be in accordance with the undisputed evidence. The following excerpt from the statement of facts in the brief of counsel for the defendant is, we think, alone sufficient to determine whether the district court erred in its charge respecting the character of the mine:

"From the very beginning of the development of this mine and up to the time of the accident which occurred on the 29th of November, 1914, no explosive gases had been found or were known to exist in this mine or in any of its workings, with the single exception that gas had been found about the 1st of October, 1914, nearly two months prior to the accident, in a crosscut just started, and which had not been completed, at the face of the second west entry * * * After the discovery of the gas, on the 1st of October, 1914, McMillan made a daily

inspection every morning of the mine and the workings of it, with a safety lamp, for a period of three or four weeks. * * * This witness, who stated he had been working in the mines since 1870, and who had practically 44 years of continuous experience in such mines, testified that he discontinued the examination with a safety lamp because he had reached the conclusion that there was not likely to be an accumulation of explosive gases in that mine; and he further stated that he did not consider that mine of such a character that he would expect to find an accumulation of explosive gases therein."

All the witnesses agree that explosive gas was found in the mine about the time stated by counsel, and that at that time proper steps were taken to exclude the gas from the mine. The fact that explosive gas was found in the mine was therefore an undisputed question, and, that being so, no finding to the contrary could have been truthfully made by the jury. Where a finding with respect to any essential fact must necessarily be in the affirmative, it is ordinarily the duty of the court to declare the fact, and not permit the jury to assume that they may find the fact contrary to the undisputed evidence. The evidence is therefore clear and without dispute that explosive gases were discovered in defendant's mine at least on one occasion before the accident, and that such fact was known to defendant's agents who were in charge of the mine, and was therefore known by the defendant. The mine was therefore one which, under the statute, was known to be a mine which generated explosive gases, and hence was governed by the provisions enumerated in the section we have quoted. It was also admitted by all of the witnesses that no examination or inspection of the mine was made as required by the statute for at least several weeks before the accident in question occurred. Then, again, the evidence clearly authorized the findings of the jury that an explosion of gas occurred in the mine at the time of the accident; that the explosion caused the injury to the deceased and resulted in his death; that the deceased was not guilty of contributory negligence; that he did not assume the risk; and that at the time of the explosion he was where he had a right to be in the mine. The control-

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ling facts are therefore either admitted or are established by sufficient evidence to justify the verdict.

Counsel for the defendant, however, contend that the question of whether defendant's mine generated explosive gases or not within the purview of our statute is not a question that can be determined except by those who possess the necessary knowledge and experience upon the subject of explosive gases in coal mines. In other words, they insist that the question is one that must be determined by expert evidence. Counsel's theory is perhaps best illustrated by certain questions propounded by them to a certain witness, who, it was shown, possessed the necessary knowledge to testify upon the question. The question propounded reads as follows:

"From your knowledge of coal mines where you had operated and in this mine, would you consider this mine as you knew it at that time in November, 1914—Would you say that this mine, as you knew it at that time in November, 1914, would you say that this was a gaseous or non-gaseous mine?"

A number of questions of similar import were propounded by counsel, not only to this but to other witnesses. The court excluded the proffered evidence, and counsel insist that the ruling constituted error.

Counsel's theory seems to be that unless the mine in question developed a certain quantity of explosive gases, that is, a quantity which would in the opinion of experts make a mine dangerous or unsafe, it would not constitute a mine known to generate explosive gases within the 2 purview of our statute. In our judgment that contention is clearly untenable. The language of the statute is positive and direct. There is no qualification such as counsel seem to assume. The language of the statute is, "In all mines known to generate explosive gases" the examination and inspection directed by the statute must be made. A moment's reflection will make clear that the statute was intended to and does apply to all mines where explosive gases are known to exist, regardless of the quantity thereof. The Legislature thus withdrew the question respecting the quantity of gases, or whether the quantity was safe or otherwise, from the judg-

ment of all classes, whether experts or nonexperts, and imposed the duty of examination and inspection in all mines where explosive gases in any quantity are known to exist. The question, therefore, is not, Are there explosive gases in the mine in sufficient quantity to make the mine unsafe or dangerous? But the only question to consider is, Has explosive gas been discovered in the mine? And if it has the mine is necessarily one which is known to generate explosive gases. If explosive gases are found in a mine, then it is known to exist, and there is then no alternative save to follow the requirements of the statute with respect to examination and inspection. The Legislature has thus adopted the safe course. That its judgment in that regard is sound is demonstrated by the facts in this case. Here the evidence is conclusive that explosive gases were discovered in the mine about 60 days prior to the accident. The gases thus discovered were dissipated in the usual way, and the examination and inspection of the mine was kept up as required by the statute for some weeks. Some time before the accident, however, the examination was discontinued for the reason, as the witness who made the daily examination said, that no more gases were discovered. The fact was, however, established by what had theretofore been discovered that the mine generated explosive gases. Had the examination continued, it is reasonably certain that the gases which caused the explosion complained of would have been discovered and the explosion prevented. The duty of a continuous examination and inspection is imposed by the statute for the express purpose of obviating the very condition which arose in this case. That such is the proper construction of our statute is the effect of two decisions emanating from the federal courts, namely, *Deserant v. Cerillos Coal Ry. Co.*, 178 U. S. 409-420, 20 Sup. Ct. 967, 44 L. Ed. 1127, and *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54, 32 C. C. A. 156. Counsel for defendant have, however, also cited two cases on which they rely, namely, *Timson v. Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565, and *D'Jorko v. Berwind-White Coal Co.*, 231 Pa. 164, 80 Atl. 77. In the first case last

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above cited the court, in the course of the opinion, at page 588, of 220 Mo., at page 566, of 119 S. W. said:

“The petition does not aver that the mine in question was a mine in which gas was generated,”

and in connection with the foregoing the court further on in the opinion, said,

“Plaintiff offered no proof of the fact that the mine in question generated gas.”

The case cited from Pennsylvania is to the same effect. In the Missouri case the trial court, without either allegation or proof, held as a matter of law that all coal mines generate gas, and the Supreme Court held the ruling erroneous. It requires no argument, therefore, to demonstrate that the foregoing cases have no application here. In the case at bar the fact that the mine in question generated gas was pleaded and admitted. The district court, therefore, committed no error, either in charging as it did, or in excluding the evidence complained of.

It is next contended that the district court erred in refusing a number of requests to charge which were offered by the defendant. The principal complaint in that connection relates to a certain request in which specific statements were contained with regard to plaintiff's right to re- 3
cover as administrator for the benefit of two sisters of the deceased who live in Italy. It must suffice to say that that phase of the case was sufficiently covered in the court's general charge, and for that reason the court committed no error in refusing the request. The request, however, contains some propositions which were too favorably stated in favor of the defendant, while others were too strongly stated against the plaintiff. For that reason also the court committed no error in refusing the request.

In connection with the point just discussed it is also contended that the evidence is insufficient to justify a recovery except for nominal damages. In that contention we cannot concur. While the evidence respecting the two sisters' rights is not exceedingly strong, yet it is sufficient to sustain the finding and judgment.

Finally, it is contended that the court erred in denying defendant's motion for a new trial. The jury returned a verdict in favor of the plaintiff for the sum of \$3,400. One of the grounds of the motion for a new trial was that the damages allowed were excessive. The district 4, 5 court required the plaintiff to remit all in excess of \$2,000, or, in case he refused to do that, submit to a new trial. The plaintiff acquiesced in the ruling of the court, and remitted the excess over \$2,000, and the judgment was entered accordingly. It is now contended by counsel for defendant that the court erred in not setting aside the entire verdict and in not granting a new trial. In cases like the one at bar the question of the quantum of damage is largely within the judgment of the jury. True, the district court may exercise a sound legal discretion in determining whether a new trial should or should not be granted upon the ground of excessive damages. Counsel, however, also contend that in view of the amount allowed by the jury the verdict is necessarily the result of passion and prejudice. The mere fact that the verdict of a jury may be excessive is not alone sufficient to show that it is the result of passion or prejudice. See *Stephens Ranch & Live Stock Co. v. Union P. R. Co.*, 48 Utah, 528, 161 Pac. 459, and cases there cited. Numerous cases are there referred to in which it was held that the trial courts committed no error in requiring the successful party to remit a portion of the amount found in his favor. In many of those cases the difference is larger than in the case at bar. The question of whether a new trial should have been granted upon the ground now under discussion was therefore largely in the discretion of the district court. As pointed out in *Jensen v. Denver & R. G. R. Co.*, 44 Utah, 100, 138 Pac. 1192, 1193, the power to grant new trials upon the ground of excessive verdicts can rarely be exercised by this court, and the only power we ordinarily possess is to determine whether the trial court has abused its discretion in refusing to grant a new trial upon that ground. Nothing appears in the record before us from which we can say that the trial court abused

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its discretion in refusing the motion for a new trial and hence it follows that this assignment must likewise fail.

We remark that while counsel for the defendant offered numerous requests and have assigned errors because the district court refused to charge the jury as requested, a careful reading of the court's charge discloses that all the issues were carefully and sufficiently submitted to the jury, and that there is no error in the record.

For the reasons stated, the judgment is affirmed. Plaintiff to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

WALL v. SALT LAKE CITY

No. 2956. Decided October 30, 1917. (168 Pac. 766.)

1. **LIMITATION OF ACTIONS—STATUTE OF LIMITATIONS—APPLICATION TO MUNICIPALITY—STREET.** There is no bar by statute of limitations in Utah against a municipality, in respect to a public street within its boundaries. (Page 605.)
2. **ESTOPPEL—ESTOPPEL OF MUNICIPALITY—LAND AS PART OF STREET.** Where claimants of property in a city petitioned the city council for the approval of a map whereby the ground was divided into lots and blocks, a street being represented as 66 feet in width, and the council, after investigation by the city attorney and by itself, authorized the city engineer to approve the map, and some time later the question of the claimant's title to the land was again raised and again referred to a new city attorney, who reported to the new city council that it had no authority to set aside its former action and was estopped from so doing, and plaintiff lent money on mortgage on the land, and subsequently the city assessed her thereon for taxes, the city was estopped to claim as a public street premises lying without the sixty-six-foot width of the street shown on the map. (Page 607.)
3. **MUNICIPAL CORPORATIONS—ACTIONS AGAINST—PRESENTMENT OF CLAIM—STATUTE.** Plaintiff, before suing defendant city to quiet title to premises claimed by the city as part of a street, for damages, and for injunctive relief, was not required to present her claim for damages to the city council, as provided in Comp. Laws 1907, sections 312, 313, the statute not applying where the principal relief sought is equitable, and the damage prayed merely incidental.¹ (Page 607.)

¹ *Dahl v. Salt Lake City*, 45 Utah 544, 147 Pac. 622.

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Appeal from District Court, Third District; *Hon. T. D. Lewis*, Judge.

Action by Nellie M. Wall against Salt Lake City, a municipal corporation.

Judgment for plaintiff. Defendant appeals.

AFFIRMED.

H. J. Dinniny, City Atty., *W. H. Folland* and *M. C. Davis*, Asst. City Attys., for appellant.

Dey, Hoppaugh & Fabian for respondent.

THURMAN, J.

The defendant, Salt Lake City, contends that Eighth South street in said city is 132 feet in width throughout its entire length. Respondent disputes this claim and contends that the street from Tenth East to Thirteenth East is only sixty-six feet in width, and that the remaining sixty-six feet claimed by appellant to be a part of the street is private property and belongs to the plaintiff. Title to this disputed strip of ground constitutes the subject-matter of this action.

Plaintiff was in possession of the premises under claim of title when the defendant, against her protest, entered upon the same and commenced to excavate the ground for the construction of a sewer, upon the assumption that it was part of the street, and therefore under the domination and control of the city. Plaintiff thereupon brought this action to quiet title, for damages, and for injunctive relief. Both the complaint and the answer indulge to an unusual extent in the statement of matters purely evidentiary, the substance of all of which, however, is to the effect that each party claims title to the property.

Plaintiff bases her claim upon divers mesne conveyances made by persons who occupied the property both before and after the townsite entry was made in 1871. These persons occupied the property in question, together with other land adjacent on the south, as a farm or pasture. The land was

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inclosed during a large portion of the time from some date prior to 1871 until 1891, when plaintiff's grantors platted the same as a town site under the name of Fremont Heights, in which plat Eighth South street is only sixty-six feet in width. During all of the time prior to 1891, there is no substantial evidence that the ground in dispute was used as a public street. In fact, the evidence shows quite conclusively that the physical and topographical conditions of the ground were such as to preclude the possibility of using it as a street, especially for vehicles or similar modes of travel. The ground was steep and rugged, a large gulch several feet in depth occupied a considerable portion of it, and a large canal crossed it, all of which rendered it practically, if not entirely, unusable as a public street. This is substantially the condition the ground was in when plaintiff's immediate predecessors in interest platted it and procured it to be adopted as an addition to the city in 1891.

The defendant city bases its right to the premises in question upon certain plats or diagrams found in the files of the city and County of Salt Lake, which, however, do not appear to be authenticated as official plats. One of the plats, called plat F, is especially relied on by the defendant, because it is claimed that it covers the ground in question and that it was recognized by plaintiff and her predecessors in interest, with its lots, blocks, and streets, as a plat of that portion of the city prior to the town-site entry and since, and that plaintiff is bound thereby. Defendant city does not contend, as we understand it, that the city opened or used the ground in question as a public street prior to the adoption of the Fremont Heights addition, except by a general ordinance or resolution in 1887 authorizing the opening of streets and removing obstructions therefrom. But defendant city contends that, the ground being platted as a public street some time anterior to the entry of the town site in 1871, it was not necessary that the same should be opened or used by the public at that time in order to give the city title thereto. It contends, further, that the action of the city in adopting and sanctioning the Fremont Heights addition in 1871, whereby Eighth South

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street between Tenth and Thirteenth East was limited in width to sixty-six feet and the strip of ground in question was recognized as private property, was ultra vires, illegal, and void. Being so considered by the city in 1912, it proceeded to assert its claim to the ground as part of a public street, entered upon the same to construct a sewer, and exercised the acts of dominion complained of by plaintiff in her complaint.

These are the main contentions of the parties as to the bases of their respective claims of title. Minor considerations in support of or against these contentions will be referred to, if material, later on in the course of this opinion. The case was tried by the court; judgment rendered for the plaintiff, declaring her to be the owner of the property, awarding her damages and injunctive relief. Defendant appeals and assigns many errors.

In our view of the case, many of the questions argued at great length by counsel for the respective parties need not be considered in detail, as the conclusion we have reached renders them immaterial and their consideration wholly unnecessary. Some of the questions thus presented are of great importance, and whenever a case is presented in which they or any of them, become turning points in the case they will then be of vital importance, and should receive the consideration which their importance demands.

Whether or not the ground in dispute was a platted street at the time the town site was entered, and whether or not it was platted at that time and recognized by persons conveying adjacent property, and whether or not occupants of the land, in presenting their claims to the probate court, by not claiming certain ground platted as streets, thereby abandoned any right they may have had or became barred by the statute of limitations, and whether or not the federal grant under which the town site was entered should be construed one way or the other, are questions which are not in the least degree controlling in view of the conclusion at which we have arrived. In our view the one question in this case which overshadows all others, and to which this opinion should be mainly directed,

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is whether or not the defendant city is estopped by reason of its own conduct from now claiming title to the property in question. This being the case it is manifest that any serious consideration given to the questions above referred to would be entirely unnecessary.

The facts bearing upon the question as to whether or not the defendant is estopped are either admitted, or so conclusively established by the testimony as to place them beyond question. As before stated, prior to 1891 the ground in question, with other land adjacent on the south, was inclosed and used as a farm or pasture. In 1887, Kelsey and Gillespie, real estate dealers of Salt Lake City, purchased the land which had been inclosed, including the ground in question used as a farm, as above stated, and succeeded to whatever title the prior owners of the property had. The first known claimant was Ellsworth who sold to Clift in 1867; Clift sold to Goddard; Goddard to Cummings, and Cummings to Kelsey and Gillespie. Those were the persons who had claimed the property and used it for farming purposes. Kelsey and Gillespie conceived the idea of making the ground, consisting of some 45 acres, an addition to Salt Lake City, consequently, in 1891, they platted it into lots, blocks, and streets under the name of Fremont Heights with Eighth South street, the street in question, 66 feet in width the whole length of the town site.

The undisputed record shows that in August, 1891, Louis P. Kelsey, James K. Gillespie, and Kate B. Gillespie claimed to be the owners of the property in litigation, basing their claim upon mesne conveyances commencing prior to 1867; that on or about the 4th day of August, 1891, they petitioned the city council of defendant city for the approval of a map whereby the ground in question, with other lands adjacent, was divided into lots and blocks, also showing certain streets dedicated to public use, among which was Eighth South street represented as being 66 feet in width between the canal above referred to and Thirteenth East. Abutting on said street on the north side were blocks 2, 3, 4, 5, 6, and 7, platted as private property, the same being the premises in dispute in this action. Accompanying this petition and map was an abstract of title

to all the ground represented on the map, together with the affidavits of Goddard and Clift, previous owners of the property, to the effect that the property platted had been occupied since prior to 1867, and that the same had not been used for public highways, but had been inclosed with a fence and was under a state of cultivation. The affidavits also tended to show the impossibility of using the ground in question as a street because of its physical condition. A question being raised as to the title of petitioners to certain parts of the ground claimed by the city as public streets, the matter was referred to the city attorney, W. C. Hall, and after examining the abstract of title and affidavits referred to, on the 29th day of September next following, he reported to the city council that if the claim of the petitioners was true as to adverse possession then their title would be good, but not otherwise. Upon request of the petitioners the city council went upon the premises and made personal examination, with the view of determining the extent to which it had been occupied, and to acquaint themselves with the facts. Thereafter, on the 6th day of October following, the city council authorized the city engineer to approve the map. On the 24th day of March following, Kelsey and Gillespie, by letter to the city council requested grades to be established on Fremont Heights on some of the streets platted therein, among them being Eighth South street, upon which abuts the ground in question. The record shows that on the same day the request was granted by the city council. In April, 1892, the record shows that the question as to the title of Kelsey and Gillespie to the ground now claimed by the city as a public street was again mooted. The matter was again referred to the city attorney. Hon. E. D. Hoge, in the meantime, had succeeded Mr. Hall to that office. A new city council had also been elected. After a brief review of the matters already referred to, the city attorney reported to the city council, and gave his official opinion to the effect that the council had no authority to set aside its former action in relation to Fremont Heights and were stayed from so doing, whereupon the city council, by resolution, adopted the profile map above referred to. Prior to this, however, in March, 1891,

Kelsey and Gillespie, in consideration of \$1, had executed a deed to Salt Lake City for certain interests in land claimed by them which was not included in the plat of Fremont Heights. Thereafter, in October, 1893, Kelsey and Gillespie borrowed from the plaintiff the sum of \$3,000, and to secure payment of the same executed a mortgage on the said blocks 2, 3, 4, 5, 6, and 7, Fremont Heights, the premises in litigation. Thereafter, in 1900, Kelsey and Gillespie having failed to pay said indebtedness, the mortgage was foreclosed and the property sold. Plaintiff thereafter succeeded to the title. The record also shows that sales of lots as platted in Fremont Heights were made, some of them being parts of the very ground in dispute, and warranty deeds executed therefor. Some improvements were made thereon by leveling and filling in low places. Taxes, both general and special, were levied against the property of the plaintiff, and paid by her, on account of this very property, under threats by the city that unless they were paid the property would be sold.

These various proceedings, acts, and conduct on the part of the city, the plaintiff, and her predecessors in title, occurred between 1891 and 1912, at which time the city commenced to assume dominion over the property by the construction of the sewer hereinbefore referred to. There is some evidence also tending to show that after the grade of the streets in Fremont Heights was established Kelsey and Gillespie, the owners thereof, commenced to grade the streets, but did not complete the same owing to the difficulty at that time of obtaining money. It further appears from the record that, prior to loaning her money and taking the mortgage therefor, plaintiff was shown the plat of Fremont Heights and the premises in question, and the nature of the security fully explained. It appears that other lots were sold in Fremont Heights addition and residences constructed thereon.

From the foregoing it appears that twenty-one years elapsed after the first adoption of the plat of Fremont Heights before the defendant city entered upon the premises and commenced the work which finally culminated in the commencement of this action. The trial court after finding, in substance, the

foregoing facts, and many others not herein enumerated, found as a conclusion of law "that the defendant by its acts, conduct, and representations, as heretofore found, is estopped from setting up any claim whatsoever to said property or any part thereof for any purpose whatsoever."

Appellant vigorously challenges the validity of this conclusion of law and cites many authorities in support of its contention. The facts upon which the conclusion is based being true, as found by the court, the question to be determined is, Is the conclusion sustained by the facts, and is it correct as matter of law? It is not our purpose to review in detail all of the cases and authorities cited, because upon examination it will be found they are nearly all cases in which the facts are so dissimilar to the facts in the case at bar that by no process of reasoning, however ingenious, can they be made to apply to the present case. The cases and authorities cited and relied on by appellant are as follows: *Biglow v. Ritter*, 131 Iowa, 213, 108 N. W. 218; *City of Waterloo v. Union Mill Co.*, 72 Iowa, 437, 34 N. W. 197; *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036; *Shirk v. City of Chicago*, 93 N. E. 193; *Schultz v Stringer et al.*, 168 Iowa, 668, 150 N. W. 1063; *City of Sullivan et al. v. Tichenor*, 179 Ill. 97, 53 N. E. 561; Note to *Oliver v. Synhorst*, 7 L. R. A. (N. S.) 243; *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088; *Johnson v. City of Shenandoah*, 153 Iowa, 493, 133 N. W. 761; *Booth v. City of Prineville*, 72 Or. 298, 143 Pac. 994, L. R. A. 1915B, 1084; *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Harn v. City of Dadeville*, 100 Ala. 199, 14 South. 9; Dillon, Mun. Corps. (5th Ed.) vol. 3, section 1194; Elliott, Roads & Streets (3d Ed.) vol. 2, section 1189.

Upon examination of the foregoing cases it will be observed that nearly, or quite, all of them are based upon facts, as before stated, entirely dissimilar to the facts in the present case. They are cases in which the party contesting the right of the municipality relied on the doctrine of laches, prescription, adverse possession, statutes of limitation, or equitable estoppel by reason of long acquiescence in the conduct of the

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parties claiming the property as against the municipality. None of them present a case like this, where the municipality, by its own affirmative acts, declarations, and conduct, misled the party, or induced him to believe that he had the right to rely upon the assurances which the municipality, after a long period of time, sought to repudiate to his injury. Indeed, it is hardly to be expected that many cases, if any at all, can be found in the published reports similar to the case at bar. It will be found upon examination that many of the cases above cited place emphasis upon the fact that the municipality did not do anything affirmatively to mislead the party claiming the right to the ground in dispute.

In support of its contention respondent cites the following cases: *Paine Lumber Co., Ltd., v. City of Oshkosh*, 89 Wis. 449, 61 N. W. 1108; *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; *Weber v. Iowa City*, 119 Iowa, 633, 93 N. W. 637; *Reuter v. Lawe*, 94 Wis. 300, 68 N. W. 955, 34 L. R. A. 733, 59 Am. St. Rep. 892; *City of Davenport v. Boyd*, 109 Iowa, 248, 80 N. W. 314, 77 Am. St. Rep. 536; *Portland v. Inman Poulsen Lumber Co.*, 66 Or. 86, 133 Pac. 829, 46 L. R. A. (N. S.) 1211, Ann. Cas. 1915B, 400; *Davies v. Huebner*, 45 Iowa, 574; 2 Lewis, Eminent Domain (3d Ed.) section 854; *Schooling v. City of Harrisburg*, 42 Or. 494, 71 Pac. 605; *City of Los Angeles v. Cohn*, 101 Cal. 378, 35 Pac. 1002.

By far the greater number of the cases cited by respondent, like those cited by appellant, relate only to questions of adverse possession, prescription, statutes of limitation, and equitable estoppel by acquiescence on the part of the municipality, after a long lapse of time in which it is claimed by the party contesting the right of the municipality that it should be estopped, under the circumstances, from asserting that the ground is a public street. Very few of the cases show that the municipality did any affirmative act, or made any declarations, as a basis for the estoppel. In other words, the majority of the cases cited by respondent simply assert the contrary doctrine to that held by the cases cited by appellant under facts generally, if not entirely similar. Numberless cases on

both sides of the question, in addition to those cited by appellant and respondent, could be referred to, reviewed, and criticized, and only one conclusion could be finally reached, and that is, that in the character of cases cited the decisions appear to be in hopeless conflict.

The case of *City of Los Angeles v. Cohn*, supra, cited by respondent, is analogous to the present case to a certain extent. The last paragraph of the opinion sums up the principal facts together with the judgment of the court. We quote the same in full:

"We again detail the facts. Before the buildings were erected, with a knowledge and concurrence of the owner, the city instructed its agent to investigate and report to the council its rights in the land. The agent did investigate, and reported that the city had no claim or title. This report was received, placed on file, and entered in substance upon the minutes of the proceedings of the council. Nothing more was ever done by the city until this action was brought, a period of twenty years later. Upon the reception of the report, and its filing among the records of the city, defendant's grantors at once proceeded to the erection of a large and valuable building, and there it stands at the present day. A judgment for plaintiff would result in a destruction of this property. These facts are potent in themselves, and in our researches we have found no case which may so well be termed an 'exceptional case.' We have found no case which with better reason should form a 'law unto itself.' It is a case where an estoppel in pais is properly pleaded. For the foregoing reasons it is ordered that the judgment and order be affirmed."

The court, in the case referred to (101 Cal. at page 377, 35 Pac. at page 1002) says:

"We think, therefore, that mere adverse possession for the statutory period of a street or alley in a town which is a public highway cannot confer a title, but where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice. For example, when the party, either under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of the town, and expended his money in erecting buildings thereon without interference on the part of the public, these or perhaps other circumstances connected with adverse possession for the statutory period may afford good grounds for estoppel."

We confess that we are unable to see any difference in principle between a person who, under the circumstances, spends

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his money in the erection of a building and one who expends his money upon the same assurance for the purchase of land which is the subject of controversy. The loss to a party of his improvements of the value of \$3,000 or more is no greater injury to the person injured than the loss of any other investment of the same amount.

In *Reuter v. Lawe*, supra, there are some points analogous in principle to the facts in the present case. They are fairly well stated in the syllabus which reads as follows:

“The owner of land (Lawe) made and recorded a plat thereof, all being divided into lots and blocks, except a tract designated ‘Public Square.’ Twenty-seven years later he replatted this and other land, the land previously designated as ‘Public Square,’ being designated as ‘Lawe’s Park,’ and, together with certain lots, being also designated as ‘block 21.’ An act passed seven years later, which incorporated a city embracing such territory, expressly adopted the plats, and provided for replatting the premises covered thereby. Proceedings were taken by or under the direction of the city council resulting in the recording five years later, of an official plat, by which the land previously designated as ‘Lawe’s Park’ was subdivided into lots of block 21. Shortly after this, Lawe incurred some expense in taking out stumps and otherwise improving the premises. Soon after incorporation of the city, Lawe, by order of the city council built a sidewalk along one side of such park. The land designated as ‘Public Square’ was not taxed until the making of the second plat, but was taxed thereafter. During all the time Lawe continued in the actual possession of the premises, the same being actually inclosed and used by him throughout substantially the whole period. [The court] held that, notwithstanding any dedication by the first plat, the public was estopped to claim the land.”

In 94 Wis. at page 306, 68 N. W. at page 957, in concluding its opinion, the court says:

“The adoption of the second plat by the act incorporating the city of Kaukauna in 1885, the requirement made by such city of Lawe to build a sidewalk along the side of the park, the construction of such sidewalk, the payment of taxes assessed annually on the property for a long period of years, and the improvement of the property at considerable expense, relying upon the long-continued recognition of private ownership by the municipality, in which all persons interested, so far as appears, acquiesced, with all the other facts and circumstances, show satisfactorily that, if a change of position on the part of the public be now allowed, such injustice and wrong will result as to warrant the application of the doctrine of equitable estoppel in pais to prevent such injustice.”

There is one feature in a large number of the leading cases on both sides of this question of special interest in determining the law relating to the question under review. Both sides rely on the doctrine enunciated and declared by Judge Dillon, perhaps the greatest expounder of municipal law this country has thus far produced. Several of the cases above cited by both appellant and respondent refer for authority to the work of Judge Dillon on *Municipal Corporations*. What he has said upon the question in that work seems to be quite generally accepted as sound doctrine. We therefore, in attempting to arrive at a just conclusion in respect to what the law is upon this point, feel justified in referring to the same author upon which so many courts of the country seem to rely. After discussing generally the doctrine of adverse possession and prescription as applied to public streets, Judge Dillon, in 3 Dillon, *Mun. Corps.* (5th Ed.) section 1194, says:

“Upon consideration, it will perhaps appear that the following view is correct: Municipal corporations, as we have seen, are regarded as having, in some respects, a double character, one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them unless excluded from them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require.”

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The note referred to in the text cites numerous cases including most of those relied on by both appellant and respondent, and many others besides. We believe we are in accord with the law relating to this question as declared by Judge Dillon in the excerpt above quoted. As far as the statute of limitations and the doctrine of prescription and adverse possession is concerned, our statute (Comp. Laws Utah 1907, section 2866x) determines that question, and if that was the turning point in this case the judgment would have to be reversed.

There is no bar by statute of limitations in this state against a municipality in respect to a public street within its boundaries. As to whether the street in question here was a public street prior to the adoption of the plat of Fremont Heights, and if so whether or not it was abandoned or 1 could have been abandoned at or prior to the time the plat of Fremont Heights was approved and adopted, it is not necessary to determine. These are serious questions, and it is more prudent to determine them when it becomes necessary in some particular case than it is to attempt to determine them now as purely moot questions. Should we determine them now most favorably to appellant's contention our judgment in the case would, nevertheless, have to be the same. The defendant city, with all the facts before it, with apparent caution and deliberation entered upon the investigation in 1891 as to whether or not the ground in question was within the limits of a public street. Every fact known to plaintiff's predecessors in title, Kelsey and Gillespie, relating to the title to this property, as far as the record shows, was disclosed to the city council when these gentlemen filed their petition. The council referred the matter to the city attorney. If there was any deception or duplicity practiced by Kelsey and Gillespie in respect to the matter it is not apparent in the record. At their request members of the city council went upon the ground and examined the premises. The city attorney made his report and, upon his report, the city engineer was directed by the council to approve the plat. Kelsey and Gillespie thereupon requested that grades be established by the city

on certain streets in the plat, and the city ordered that the grades be established. Work was then commenced by Kelsey and Gillespie on the street in question. The large gulch was partially filled up, but for want of the necessary funds at that time the work was suspended. The question of title to the ground as a street within a year or two thereafter again came before the city council. A new council had been elected. Very likely it conceived the idea that it ought to overhaul the work of its predecessor especially as to any doubtful public question. Again the matter was referred to the city attorney—a new one appointed by the new council. He investigated and reported that the city was estopped from attempting to undo what it had before done pertaining to Fremont Heights. The council then, by formal resolution, adopted the profile map of Fremont Heights and there the matter rested. It was after all this had happened and it had all been explained to the plaintiff that she loaned her money to Kelsey and Gillespie on the security of these lots which the defendant now claims as a public street. In addition to this the defendant went on for years and years assessing this property against the plaintiff as private property. Its revenues were increased by hundreds of dollars by the sums exacted from the plaintiff on the assumption of the defendant that the property assessed belonged to her. As far as the record disclosed not even the slightest pretense of an offer has ever been made to place her in statu quo. Not only this, other matters are entitled to consideration. Other lots in Fremont Heights addition were sold and residences constructed on the faith of this plat and the proceedings of defendant in respect thereto. The plaintiff herself, on that reliance, has sold some of the very ground in question and executed a warranty deed therefor. Her grantee has expended hundreds of dollars in improving the property so purchased on the faith of a good and sufficient title to the ground he purchased. After twenty years from the time the Fremont Heights addition was approved, and after all of these equities had intervened, the defendant comes upon the scene, and with no other excuse than that it had made a mistake twenty-one years before it commenced to tear up the ground,

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and by force and arms exercise a dominion over this ground which for twenty-one years next previous it had recognized as private property. Recognized it not only by the plat it approved but by assessing it and enriching its own coffers by tribute exacted in the form of taxes. We believe, as was said by the court in *City of Sullivan v. Tichenor*, supra, cited by appellant, that:

“A municipal corporation can no more profit by fraud upon property owners than an individual and may be estopped by conduct.”

Or, as said by Judge Dillon, in note one to the section above quoted, referring to the character of acts necessary to constitute an estoppel:

The principle of estoppel in pais has been applied to exceptional cases where the elements calling for its exercise appear to have been an abandonment of the public use for the prescriptive period, inclosure and expensive improvements, such as large and costly buildings, or acts of the municipality inducing the abutter to believe that there is no longer any street, and the expenditure of money in reliance upon the acts of the municipality. The absolute bona fides of the abutter or adverse possessor is a most important factor where an estoppel in pais is claimed. The acts relied on must be of such character as to amount to a fraud, if the city were permitted to claim otherwise.” (Italics ours.)

We hold that this case falls within the exceptional class of cases referred to by Judge Dillon, and that it is the duty of the court to decide it as “right and justice 2 require.” It is our opinion that the city is estopped from claiming the premises in question as a public street.

This conclusion of the court practically disposes of the other assignments of error, except those relating to the question of damages. In addition to awarding plaintiff the property in dispute and injunctive relief, the trial court awarded her damages in the sum of \$4,528.44, with 3 interest thereon from May 14, 1914. Appellant contends that plaintiff was not entitled to damages, for the reason that she neither alleged in her complaint nor proved at the trial that she had first presented a claim for damages to the city council, as provided in sections 312, 313, Comp. Laws Utah 1907. In support of its contention appellant cites *Dahl v. Salt Lake City*, 45 Utah, 545, 147 Pac. 622, decided by this

court, in which it was held that an action for damages against a municipal corporation is barred unless the claim for damages is first presented to the city council as provided in the sections above referred to. The case cited by appellant was an action at law for damages. It sought no equitable relief whatever, and respondent insists that in that respect it is distinguishable from the case at bar. Respondent contends that the statute referred to does not apply to cases of this kind where the principal relief sought is equitable and the damage prayed for is merely incidental. In support of that contention respondent cites many cases, among which are the following: *Lamay v. City of Fulton*, 48 Misc. Rep. 153, 96 N. Y. Supp. 701, 702; *Sammons v. City of Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Lonsdale Co. v. City of Woonsocket*, 25 R. I. 428, 56 Atl. 448; *Carthew v. City of Platteville*, 157 Wis. 322, 147 N. W. 375, and many other cases. Appellant has referred us to no case contravening this doctrine in cases of this kind, and as the reasoning of the courts in the cases referred to seems to be sound and uncontrovertible we are disposed to hold that it was not necessary to present the claim for damages to the city council before bringing this action.

Appellant, however, makes the further objection that the court erred in admitting certain testimony relating to the question of damages, and cites *Hempstead v. Salt Lake City*, 32 Utah, 261, 90 Pac. 397, in which case this court sustained an instruction in effect that the measure of damages was the difference between the market value of the property immediately before and after the improvement. In this case, as we read the record, that was, in effect, the character of testimony that was received by the court, and upon which it based its judgment. We find no error in the record. The decree of the trial court is affirmed, appellant to pay costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

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DUNYON v. SCRANTON MG. & S. CO.

No. 3017. Decided October 31, 1917. (168 Pac. 755.)

1. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—CONSTRUCTION—INTENT OF PARTIES. In determining whether a contract of employment was contingent as to the amount of compensation, or definite as to the amount and only conditional as to the time of payment, the controlling question is the intent of the parties at the time of making the contract as gathered from the language used, the situation of the parties, and the subject-matter of the contract. (Page 613.)
2. CORPORATIONS—OFFICERS—COMPENSATION—CONSTRUCTION OF AGREEMENT. Plaintiff, a stockholder and director of a mining company whose other officers were residents of Pennsylvania, was employed as manager at a salary of \$350 a month. At a time when the mine was not paying expenses, and the other officers were advancing the money for its operations, the president wrote plaintiff that he must "look to you for help in deferred payment on a portion of your salary of say \$150," and that this back payment should not be exacted by plaintiff or another employee until all interest was paid and enough accumulated to meet current expenses. Plaintiff in reply stated that he and such other employee were willing to accept the proposition as to salaries as they had every confidence in the outcome of the property. In a prior letter he had stated that he was satisfied they had a big property, that it meant much to him to make it a dividend payer, and that he would stake his reputation on the outcome. After such correspondence he was paid \$200 each month, and \$150 was carried and credited to him. The corporation for more than a year thereafter did everything in its power to develop ore in paying quantities, and only suspended operations when it became impossible to longer advance the necessary money. *Held*, that it was the intention that the withheld salary should not be paid until and unless sufficient ore was found to pay the interest on the indebtedness and to meet the current expenses, and the corporation having made an honest and reasonable effort to carry out its part of the agreement without finding ore in paying quantities, plaintiff was not entitled to recover the additional part of his salary.¹ (Page 613.)

FRICK, C. J., dissenting in part.

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¹ *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

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Action by N. A. Dunyon against Scranton Mining & Smelting Co.

Judgment for plaintiff. Defendant appeals.

REVERSED.

Dey, Hoppaugh & Fabian for appellant.

Howat, Macmillan & Nebeker for respondent.

GIDEON, J.

The findings of the district court and the issues presented here are within the pleadings, hence no further reference will be made thereto.

The defendant corporation was organized about the year 1900, under the laws of this state. The plaintiff was a director of the corporation from its organization to the date of filing this action. During all of that time he was its manager and had control of its mining operations within this state. The president, treasurer, and other directors were residents of the state of Pennsylvania, and the books of the company, except the record kept by the secretary, were in that state. Up until the year 1906 plaintiff received a salary of \$100 per month. In that year, in the development of the mine, large bodies of valuable ore had been blocked out and his salary was increased to \$350 per month. That continued until July 1, 1913. During the latter part of 1912, and in the early part of 1913, the mine did not produce sufficient ore to pay the operating expenses, and numerous letters were written between the plaintiff, as manager, and Mr. T. G. Wolf, as president, in regard to the operation and development of the company's mine. On or about July 10, 1913, the president of the company wrote the plaintiff and expressed anxiety over the exploration work being done and its results, and also some doubt as to his financial ability to hold out until ore in paying quantities was found, and also advised the plaintiff that there was interest then due on overdue notes, and that the company could not meet such indebtedness. He also expressed disap-

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pointment over the amount of money necessary to be advanced for the June pay roll. He then proceeded as follows:

"I must now look to you for help in deferred payment on a portion of your salary of say \$150. This back payment should not be exacted by either you or Nebeker, until all interest is paid, and enough accumulated to meet current expenses. You know from my past action that it would not be expected unless absolutely necessary, and I hope you will accept it in proper spirit. The life of the company, in which we are all interested, is in danger, and we must all join in bridging over."

In response to that communication plaintiff replied under date of July 29, and among other things stated:

"Nebeker and myself are perfectly willing to accept the proposition you make as to salaries, as we both have every confidence in the outcome of the property."

Prior to that, on June 9, 1913, plaintiff had written Mr. Wolf, in answer to a letter from Wolf dated May 27, saying:

"As to myself will do anything that is satisfactory to you. Have made arrangements with Nebeker to take \$100 per month and get the balance when we get the ore."

That correspondence constitutes the contract under which plaintiff continued in the employ of the defendant as its manager until November 1, 1914. During that time plaintiff continued to have general control and direction of the development work carried on at defendants' mine. At the end of each month the pay roll and statement of the expenses of that month were forwarded to a Mr. Knapp, treasurer of the company, at Scranton, Pa., and a check or draft was returned by the treasurer to the secretary at Salt Lake City to pay such pay roll and expenses. All moneys received from the sale of ore were remitted to the treasurer during that time. The money necessary to meet the monthly pay rolls and expenses was either loaned or advanced to the company upon the indorsement of Mr. Wolf and other officers of the company, and the record discloses that from July 1, 1913, to December 1, 1914, the expenses connected with the development work exceeded the income something like \$20,000. In the month of

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October, 1914, Mr. Wolf advised the plaintiff by letter that owing to the difficulty of obtaining money it would be necessary to curtail expenses, and on the 16th of that month wrote the plaintiff that he had talked the matter over with Mr. Knapp, the treasurer, and that a resolution had been passed by the directors fixing the plaintiff's salary at \$100 per month from October 1, 1914. In answer to that letter the plaintiff wired Mr. Wolf that he could not accept the terms mentioned in the letter of October 16th and stated, "In case you dispose of my services * * * I will insist on immediate payment of back salary." Other correspondence was had between the parties concerning expenses and salaries and on November 23, 1914, Mr. Wolf, president of the company, wired plaintiff as follows:

"Suspend all operations at once for the winter. Sell all horses, at best prices, also engine if possible; arrange matters so that one watchman can take care of the property. Act at once pending receipt of letter. Pleased to receive suggestions. Financial conditions compel this."

As directed by that telegram the plaintiff stopped work on the mine, took an inventory of the property, disposed of a few items of personal property, procured a watchman to take charge of the mine and the property located thereon, and ceased his employment as such manager about the middle of December of that year. On the day following, to wit, December 16, 1914, this suit was instituted to recover what is termed "back salary," or \$150 per month from July 1, 1913, to November 1, 1914.

Trial was had before the court. Findings of fact and conclusions of law were made and entered and judgment rendered in favor of plaintiff. Defendant appeals. The question for determination is, Has plaintiff a right, under the facts and circumstances above outlined, to recover?

If plaintiff is entitled to recover it must be upon one of two theories: First, that the contract for his salary was for a fixed and definite amount and that the date of payment was left indefinite, and, as a result, defendant would be presumed to have contracted to pay the same within a reasonable time;

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or, second, that the contract being definite as to the amount plaintiff was to receive and the date of payment being conditioned upon the happening of a future event, and the defendant having by its own act or conduct made the happening of that event an impossibility, then the amount became immediately due and payable. It may be conceded, under the authorities, that if the facts in this case—and there is not a disputed fact in the record—bring the plaintiff within either of the above propositions he is entitled to recover. Clearly he does not come within the first, and we do not understand that he seriously contends that he does. The chief contention of the respondent is that by reason of the president of the company suspending operations for the winter of 1914 he, by that act, rendered the happening of the contingency upon which the plaintiff would be entitled to recover impossible. Therefore, the amount of his salary being definitely fixed, the balance became due and payable, and he has the right to maintain this action.

Under such contracts, as in all other contracts, the controlling question is to determine, if possible, what was the real intent of the parties at the time of making the contract. In determining that question, the intention of the parties must be gathered from the language used, the situation 1, 2 of the parties, and the subject-matter of the contract as presented by the evidence. As stated, the written contract between these parties consists of the correspondence hereinbefore given. It is clear, it seems to us, considering the former relationship of the parties, the matter concerning which they were contracting, and the language used, that it was the intention of the parties to that agreement that the back salary should not “be exacted” until sufficient ore had been found to pay the interest on the indebtedness and to meet the current expenses. That seems to have been the proposition submitted by the president in his letter of July 10, 1913, and the one accepted by the plaintiff in his letter of July 29th. In that letter he stated:

“Nebeker and myself are perfectly willing to accept the proposition you make as to salaries as we both *have every*

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confidence in the outcome of the property." (Italics ours.)

It is clearly deducible from that language that the plaintiff, in continuing his services for the company after July 1, 1913, did not expect to receive payment from any source unless ore was found of such quality and quantity as to pay the interest on the indebtedness and the current expenses. In fact, in his communication he bases his willingness to accept the proposition not upon the ability of the defendant company to pay unless it found ore; but, as he states, "we both have every confidence in the outcome of the property." In addition, plaintiff was in charge, credited with knowing, and was supposed to know, much more than any of the other officers of the workings of the company's mine, how long it would take to find ore that would pay expenses, and in his letter of June 9, 1913, prior to the date of the letter which makes up the contract between the two parties, he says:

"I am satisfied we have a big property and if it is in my power I am going to find it and I am sure we are on the right road. The making of a dividend payer of it means more to me if not financially than it does even to you, and I will stake my reputation on the outcome of it if we can only hold out for a few months, and I do hope we will be able to find something before our money is exhausted."

All parties seem to have proceeded upon the theory of having confidence in the outcome of the property until the fall of 1914. Each month the plaintiff was paid \$200 on his salary and \$150 was carried and credited to him on what was designated the reserve account.

Respondent has cited numerous authorities sustaining in a general way the proposition contended for by him, and especially seems to rely upon the case of *Hood v. Hampton Plains Exp. Co.* (C. C.) 106 Fed. 408, which is probably the strongest case cited in support of his contention. Briefly, the facts in that case were that in October, 1895, the plaintiff there entered into a contract to become watchman for the property of the defendant at a salary of \$4 per day, one half payable at the end of each consecutive fourth week, and the remaining half payable at such "time as the company [defendant] may

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resume operations or dispose of the property." Plaintiff continued in that employ under that arrangement until the fall of 1899, at which time the property had not been sold nor operations resumed. He was discharged and a suit was instituted to recover the balance of his salary. There are two elements in that case, as found by the court, that are not present in this case, and which seem to control the court's decision:

(1) "That at the time of his [plaintiff's] employment it was the general understanding that the defendant would resume operations within a reasonable time, or use reasonable efforts to dispose of its property; that in the absence of any express declarations of the parties to that effect, there being no time specified within which operations should be resumed or property be sold, the law presumes that it was the intention of the parties that the contingencies mentioned should occur within a reasonable time;" (2) that the defendant in that case voluntarily discharged the plaintiff "without any just cause" and thereby "made it impossible for him to remain continuously (as the agreement contemplated) in the defendants' service until 'it resumed operations or disposed of property.'"

Apparently no effort was made on the part of the defendant in that action during all of the time to either operate the property or dispose of it, and the plaintiff performed his part of the agreement until, as the court found, he was discharged without any just cause. No such condition exists in this case. Mr. Wolf, president of the company, repeatedly wrote the plaintiff that he had the utmost confidence in plaintiff's judgment and regretted the necessity of suspending operations, even temporarily, but the financial conditions made such suspension absolutely imperative. In addition, it is in the record, and it is not disputed, that during all the time from June, 1913, to the termination of this contract, the defendant company did everything in its power to develop ore in paying quantities in its mine and only ceased to do so when it became impossible to longer advance the necessary money for that purpose. In other words, the defendant company

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cannot be charged with not making an honest and reasonable effort to carry out its part of the agreement. Under such condition of affairs is it believable that at the time the parties made this contract in 1913 either one of them understood that if the company was unable to find ore the plaintiff would be entitled to recover the additional amount of his salary? If the respondent's theory is right, then the company was under the necessity of continuing the development work on its mine indefinitely, or, failing to do that, it would be mulcted for the unpaid part of plaintiff's salary. We do not believe any such agreement or understanding was in the contemplation of the parties. The law does not therefore impose a duty upon the defendant to pay plaintiff's claim. In *De Wolfe v. French*, 51 Me. 420, which we think is a correct statement of the law, it is said:

“If, in fixing upon the happening of a future contingent event as the time when money is to be paid, the parties intend to make the debt a contingent one, and the event never happens, the creditor's right to recover it will never accrue.”

Furthermore, as stated in the beginning of this opinion, the plaintiff was a stockholder and director of the defendant company, and was, as such, jointly interested with the other officers of the company in its success, and he must have understood and known that the ability of the defendant to pay the money that the president and the other officers of the company were advancing or lending to the company in carrying on the development work was contingent wholly upon the success of the venture. It seems likewise clear that the plaintiff was willing to devote his time for a less consideration than he had been receiving, with the hope that he, too, would not only receive additional salary but that he would share in the profits of the mine if the company were fortunate in finding valuable ore, and if not, that they would all stand their share of the losses together. That is, in making this arrangement he took a sportsman's chance and, all parties to the agreement having sustained losses, the plaintiff should not be entitled to recover an unfair advantage.

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The principles involved in this case, it seems to us, are almost identical with the questions decided by this court at the October term, 1916, in *Johnson v. Geddes*, 49 Utah, 137, 161 Pac. 910. It is true in that case, the contract stated definitely that the unpaid part of the purchase price was payable in the manner following, and not otherwise; that is, from one-half of the net proceeds of all ores mined upon the property after deducting the expenses of mining, etc., and further stated that "the extent and manner of managing and developing said property shall be left solely to the sound and reasonable discretion of said parties of the second part [defendants]." In effect, in this case, the contract of the parties was that, unless ore was found of sufficient value to pay the interest on the indebtedness and the running expenses, plaintiff should not demand or exact his back salary.

Should the defendant company in the future operation or development of this mine succeed in obtaining ore which will pay the running expenses and the interest on its indebtedness, nothing in this opinion should be construed so as to prevent the plaintiff from then recovering the amount of back salary payable to him under his contract.

In view of the foregoing conclusions the judgment of the district court, awarding plaintiff judgment, must be reversed. Such is the order. Plaintiff to pay costs.

MCCARTY, CORFMAN, and THURMAN, JJ., concur.

FRICK, C. J. (dissenting in part).

As stated in the opinion of Mr. Justice GIDEON the question in this case is, What were the terms of the contract entered into between the company and the plaintiff respecting the payment of plaintiff's salary? When that is once determined nothing remains for the court to do save to enforce the terms of the contract in accordance with the settled principles of law applicable thereto.

The correspondence between plaintiff and Mr. Wolf, president of the company, is very voluminous, and large portions of it have little, if any, bearing on the principal question

involved here. The parts of the correspondence set forth by Mr. Justice GIDEON in his opinion, and upon which he bases his conclusions, are, in my judgment, hardly sufficient to reflect the real intention of the parties to the transaction involved here. It is no easy task for any one to select from a large mass of correspondence a few excerpts which it may be said contain and adequately reflect all of the terms and conditions of a contract and the intention of the parties, as such intention appears from the whole mass of correspondence between them. Moreover, reasonable men can, and do, honestly differ respecting just what should be excerpted for the purpose of showing the real intention of the parties. While there might be dissents from the following excerpts, and more or less might be selected from the general mass of the correspondence by others, yet, in my judgment, the real intention of the parties may be gathered from the following excerpts.

The first letter referring to the reduction of the salary of the superintendent of the mine was written by Mr. Wolf, the president of the defendant company, to the plaintiff, the general manager in charge of the mine, on May 27, 1913. Among other things the president wrote:

"You mentioned some time since a reduction in Nebeker's salary pending discovery of ore. While I regret suggesting it at this time, I feel that it is necessary, and in view of your keeping in close touch as you are doing and which I trust you will continue to do, Nebeker has not the responsibility that usually pertains to his position. In some way this reduction could be made up to him as a bonus when we are again on our feet."

Plaintiff answered that letter June 9, 1913. He, among other things, said:

"And as to myself, will do anything that is satisfactory to you. Have made arrangements with Nebeker to take \$100 per month and get the balance when we get the ore."

On July 10, 1913, Mr. Wolf wrote the plaintiff, and in that letter, for the first time, referred to plaintiff's salary. After referring to the conditions prevailing at the mine and at home he wrote:

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"I must now look to you for help in deferred payment of a portion of your salary of say \$150. This back payment should not be exacted by either you or Nebeker until the interest is paid and enough accumulated to meet current expenses."

Plaintiff, on July 29, 1913, answered Mr. Wolf's letter with respect to the salaries, saying:

"Nebeker and myself are perfectly willing to accept the proposition you make as to salaries, as we both have every confidence in the outcome of the property."

While much correspondence passed between plaintiff and Mr. Wolf after the foregoing letters were written, yet nothing material to the point in question was contained therein until a letter dated October 16, 1914, was written, wherein Mr. Wolf, again referring to salaries, for the first time mentioned a reduction of plaintiff's salary, in the following words:

"Have talked with Knapp and Warren about conditions at a meeting and it was 'resolved, that under present conditions that your salary from October 1st will be reduced to \$100 per month, including expenses, and that Nebeker's salary from same date for constant services will be \$125, the above being total salaries.' This was unanimously adopted. This we find under financial conditions to be absolutely necessary."

On October 22, 1914, following, plaintiff wired Mr. Wolf as follows:

"I cannot accept terms in your letter October 16th. In case you dispose of my services, as it seems you are trying to do, I will insist on immediate payment of back salary."

Two days thereafter, namely, on October 24, 1914, Mr. Wolf wrote a long letter in answer to the telegram in which he said:

"I will state here that if another arrangement is made by which you will remain, and I hope there will be, the excess salary will not be allowed, as I believe under the conditions it is unbusinesslike and unfair to those who have never received a cent from the property."

To that letter plaintiff replied on October 28, 1914, as follows:

"My proposition to you is this, I will dispense with Nebeker's services and attend to things myself until such time as

the mine warrants the getting of some one to help me, for \$250 per month, and I believe I can more than earn this amount for you. Of course when the mine is in such condition that it can well afford to pay more I would expect an increase and feel that you would be willing to grant it."

Mr. Wolf answered that letter on November 9, 1914. In the course of his letter he wrote:

"There is no doubt that the resolution passed [which, by the way, is held here] can be changed by an increase to \$150 from the amount named in the resolution, but this is the limit we can go in what I now look upon as exploration work."

That letter was followed by a telegram from Mr. Wolf to plaintiff dated November 23, 1914. That telegram reads:

"Suspend all operations at once for the winter. Sell all horses at best prices, also engine if possible, arrange matters so that one watchman can take care of property. Act at once pending receipt of letter. Pleased to receive suggestions. Financial conditions compel this."

On November 25, 1914, Mr. Wolf supplemented the telegram by letter, but, in my judgment, there is nothing in that letter which is material to the controversy. On November 29, 1914, plaintiff replied to the telegram and letter of Mr. Wolf as follows:

"Do you mean that I am to exercise supervision over things while the mine is closed down; that I am to receive \$150 per month for it; or what do you mean? What arrangement do you think should now be made with reference to my back salary? A new element has been injected into the situation which would, for your accommodation, seem to call for a new arrangement respecting the payment of this back salary. I don't want to do anything unless I have to, for my protection, to make this matter any more burdensome to you than is necessary to keep me going. What kind of an arrangement do you want to make about this?"

Mr. Wolf, on December 7, 1914, wrote the plaintiff as follows:

"Nothing more than a nominal salary should attach to the position of manager, say \$25 per month. More than this we

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cannot do. Regarding back salaries, would refer you to my letter of October 21st. There are no back salaries due until the mine produces enough to pay the interest and indebtedness and a reasonable amount in the treasury for current expenses, as per my letter of July 10, 1913, and your acceptance for Nebeker and yourself July 29, 1913."

I refrain from quoting further from the correspondence.

The mining company also produced its books in evidence from which it appears that each month, from July, 1913, to and including November, 1914, plaintiff was credited with the amount of the salary that had been agreed upon in 1906 and which had been paid to him regularly each month, to wit, \$350. He was also debited with the amounts paid him on the foregoing salary as follows:

July, 1913	\$ 250
August, 1913	150
September, 1913	150
October, 1913	150
November, 1913	150
December, 1913	200
January, 1914	200
February, 1914	250
March, 1914	400
April, 1914	200
May, 1914	50
June, 1914	300
July, 1914	150
August, 1914	200
September, 1914	200
October, 1914	300
November, 1914	250

Total	\$3,550
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It was thus conclusively proved by the defendant that from July, 1913, to and including November, 1914, plaintiff was credited with \$5,825 on account of salary earned, while, during the same period of time, he was debited on account of salary only the sum of \$3,550, leaving a balance unpaid according to defendant's books of \$2,275. Plaintiff claimed an amount somewhat in excess of that, but that is immaterial now.

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The matters contained in the books of the defendant company are material only as showing how the salary matter was regarded by the company. There is, therefore, no dispute regarding the fact that, while the plaintiff during all of the months aforesaid actually earned and was credited with a salary of \$350 per month, he, nevertheless, was only paid at the rate of a little in excess of \$208 per month during that period of time. From both the letters and the books of the company it is, therefore, manifest that it was clearly understood by both parties that the payment of \$150 of plaintiff's \$350 monthly salary should be deferred, and not that \$200 was all the salary that plaintiff was earning during that period of time. The case, therefore, is not one where it is agreed between A. and B. that, in case a certain event or condition should happen, A. should be paid a salary of \$350 a month, but, in case it did not happen, he should only receive a salary of \$200 a month.

In this case plaintiff's monthly salary was fixed at the sum of \$350 but the payment of \$150 of that amount was to be deferred until such time as the defendant should realize sufficient from its mine to pay the interest on its obligations and the current expenses incident to the mining operations, including the deferred portion of plaintiff's salary. That such was the purport of the agreement in this case seems to me too clear to require further argument or elaboration. It is, however, also manifest from the correspondence that it was intended that the plaintiff should remain in the employ of the defendant company and that the company would continue to operate the mine with reasonable diligence and with a proper force in order to obtain sufficient money to pay the interest before mentioned and the current expenses of the mining operations, including that portion of plaintiff's salary which was left unpaid. That, to my mind, is clear from the letters written both by plaintiff and the president of the defendant company. That such was the intention is also apparent from the fact that the plaintiff expressed himself as having confidence in the mine, and hence, if the mining operations were continued, the unpaid portion of his salary would soon, or at

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least within a reasonable time, be obtained from the mine. The president also expressed the same confidence in the mine and hence intended to obtain the money to pay the interest and the deferred salary from the mining operations. Both parties, therefore, intended that the mining operations should be continued indefinitely for the purposes aforesaid. Indeed, if the mining operations were discontinued the purposes expressed by both parties could, as a matter of course, not be fulfilled. To continue the working operations at the mine was, therefore, an essential part of the agreement and was the condition upon which plaintiff based his consent to defer the payment of a part of his salary each month. The question, therefore, is, What were the respective rights and duties of the parties to the agreement?

There can be no doubt regarding that phase of the case. It clearly was the defendant's duty to continue the mining operations in good faith and with reasonable diligence in order to realize the money for the purposes before stated. On the other hand it was the duty of plaintiff to assist the defendant in accomplishing that purpose and, to that end, give the company the benefit of his experience as a mining engineer and as a mining expert so that the mineral bearing veins of the mine might be properly explored to the end that sufficient pay ore might be developed to meet the interest on existing obligations and the current expenses, including the payment of plaintiff's deferred salary. If the defendant arbitrarily and without cause suspended the operations at the mine it clearly constituted a breach of the conditions of the contract which were clearly implied and constituted a part thereof the same as if they were expressed therein. Upon the other hand, if the plaintiff, without cause, refused to perform his part of the implied conditions before stated, his conduct would also constitute a breach of the contract. It may be asked however—and the question is pertinent—whether the defendant was required to continue operations at the mine forever under the conditions implied, as before stated. There is only one possible answer to this proposition, which is in the negative. The law only requires things that

are reasonable and capable of being performed. In view, however, that the defendant was constantly receiving a consideration in the form of services from the plaintiff it was required to make all reasonable efforts to continue operations at the mine and to continue them until it was manifest that the ores in the mine were exhausted, or that it was not possible with reasonable effort to obtain ore in paying quantities. The defendant was bound to act in good faith and make every reasonable effort to carry out the conditions of the agreement.

This case, therefore, falls clearly within the principle that if A. agrees with B. to discharge an existing obligation due or to become due to B. upon certain conditions, which are within the power of A. to carry into effect, but A., by his own conduct, puts it beyond his power to fulfill the conditions, or refuses to comply with a certain part of the agreement, whereby it becomes impossible for him to perform the conditions, B. need not wait for the happening of the conditions but may sue at once to enforce the contract, because A., by his acts and conduct, has breached the contract and has thus matured the obligation which, if he had complied with its terms, would not have matured until the conditions imposed thereby had happened, which might not have occurred until some time in the future. While the cases cited below are not cited as being strictly parallel, yet they clearly illustrate and apply the principle I have just stated. *Teachenor v. Tibbals*, 31 Utah, 10, 86 Pac. 483; *Marvin v. Rogers*, 53 Tex. Civ. App. 423, 115 S. W. 863; *Hall v. Northern & Southern Co.*, 55 Fla. 235, 242, 46 South. 178; *Nunez v. Dautel*, 19 Wall. 560, 22 L. Ed. 161; *Hood v. Hampton, Etc., Co.* (C. C.) 106 Fed. 408.

In *Teachenor v. Tibbals*, supra, the doctrine is stated in the headnote thus:

“Where one voluntarily puts it out of his power to do what he agreed to do, in the way agreed upon, he commits a breach of contract and becomes liable generally.”

In *Marvin v. Rogers*, supra, the decision is correctly reflected in the headnote, and the rule is there stated in the following language:

“Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no

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obstacle in the way of the happening of such event, and, if he prevents the happening of the event, the contract becomes absolute.”

In *Hall v Northern & Southern Co.*, supra, the rule is stated thus:

“Where a bilateral contract is made for future performance, and before the time for performance arrives one party positively and unequivocally repudiates the entire contract, or voluntarily puts it out of his power to perform his part, the other party may treat the contract as rescinded. In many cases where the repudiation or voluntary act rendering performance impracticable is entire and absolute, actions may be brought as for a breach of the contract, even before the time for performance has arrived.”

It is needless to either cite more cases or to quote from them, since the foregoing excerpts sufficiently illustrate the principle that I invoke. If, therefore, the defendant company had agreed to pay the deferred portion of plaintiff's salary “only at its convenience,” he nevertheless could have enforced payment within a reasonable time if payment was refused. *Smithers v. Junker* (C. C.) 41 Fed. 101, 7 L. R. A. 264; *Works v Hershey*, 35 Iowa, 340.

Nor is anything that is said in the case of *Johnson v. Geddes*, 49 Utah, 137, 161 Pac. 910, contrary to the foregoing views. In that case the defendants had the choice of purchasing a certain mine at a certain price by paying the whole purchase price in money, or they could purchase the mine at an increased price, but if they did the latter a part of the purchase price could be paid out of the net proceeds derived from the mine. If they elected to purchase the mine at the increased price, however, they were not to become personally liable for \$9,000 of the purchase price, but that sum was to be obtained from one-half of the net proceeds derived from the ores obtained from the mine. In that case the contract, however, expressly provided that in no event should the \$9,000 be payable except from the net proceeds aforesaid. The principle of law that is stated in the cases I have first above cited was therefore expressly negatived in *Johnson v. Geddes*, supra. In other words, the parties there expressly covenanted and agreed that payment of the \$9,000 in no event should be made or become payable except in a certain manner,

and in order that payment in that manner could be enforced a perpetual lien was created on the mine. In that case it was impossible to defeat payment of the \$9,000 whether the mine was owned by the defendants or by anybody else, or whether the operations were continued or discontinued by the owners. If, at any time, net proceeds were derived from the mine, one-half thereof must be paid to plaintiffs or their successors by the then owners of the mine. If, however, the construction placed on the contract in question here by Mr. Justice GIDEON prevails, then it was and is possible for the defendant company, by its own act, to defeat payment of the deferred portion of plaintiff's salary at any time after the contract was entered into either by refusing to continue the mining operations or by selling the mine. The defendant could thus obtain the services of an expert mining engineer for an indefinite length of time and could at any time cease mining operations or dispose of the mine and thus prevent the accumulation of the money with which to pay the interest referred to by Mr. Wolf and to pay the deferred portion of plaintiff's salary. The defendant could thus, by its own act, defeat the happening of the condition upon which plaintiff should be paid the deferred portion of his salary. This the law does not permit. *Stockwell v. Gidney*, 73 Me. 84.

I have inserted a part of the correspondence which passed between the parties in the fall of 1914 for the purpose only of showing that it was not intended, until the letter of October 16, 1914, was written by Mr. Wolf, that the salary of plaintiff should be reduced. Before that letter was written no change had been contemplated respecting plaintiff's salary, except that the payment of a part thereof should be deferred. Plaintiff, however, never agreed to the reduction of his salary and hence nothing was settled in that regard when the relations between the parties were severed and this action was commenced. The fact that no reduction of plaintiff's salary was made until in the fall of 1914, and the fact that he was always credited with \$350 each month are circumstances, which to my mind, go very far to confirm the construction I have placed on the agreement between the parties.

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The only question remaining for consideration, therefore, is, What disposition should be made of this case? I am of the opinion that upon the record as it now stands the judgment is erroneous and should not prevail. As before stated, it is clear to my mind that both plaintiff and Mr. Wolf, the president of the company, intended to continue the mining operations indefinitely for the purpose of developing ore to meet the obligations and expenses referred to in the correspondence between them. While, as before pointed out, if the defendant company by its own act prevented the happening of the conditions on which plaintiff should be paid the deferred portion of his salary, such an act constituted a breach of the contract and gave plaintiff a right of action to recover the remainder of his salary, yet the question remains whether an act which might merely extend the time of payment, if done in good faith, would also have that effect. From all that appears from the correspondence between plaintiff and Mr. Wolf it was not intended to suspend mining operations permanently, but merely temporarily. The operations were to cease only for the winter of 1914. The order was not made until November 23, 1914, when winter had practically set in. So far as the order of Mr. Wolf is concerned the suspension was, apparently at least, merely temporary. In my judgment plaintiff had no right to construe that as a breach of the contract. The defendant was only required to use reasonable diligence and make reasonable effort to continue the mining operations. It was not required to do extraordinary or unreasonable things to continue them. If, therefore, there was any sufficient reason to suspend mining operations during the winter months of 1914-15, such suspension would not constitute a breach of the contract, and forthwith mature the obligation to pay the deferred portion of plaintiff's salary. There is nothing in the record which shows that the defendant did not in good faith, and that it did not have ample reason to, suspend mining operations for the winter. Indeed, I think the record clearly shows that the defendant had ample reasons for doing that. While, as before stated, the defendant cannot legally, by its own act, defeat the happening of the conditions,

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yet it was not required to do unreasonable things. This action was commenced within a few days after the order of suspension of the work at the mine for the winter was made. In my opinion that order, standing alone as it does, did not constitute an act whereby the defendant made it impossible for the conditions on which plaintiff was to be paid his deferred salary to happen, and hence did not constitute a breach of the contract. The action was therefore prematurely brought and should not prevail. While it is true that defendant did not interpose a formal plea of abatement on the ground that the action was prematurely brought, yet it constantly insisted that plaintiff was not entitled to payment, and now insists that the judgment in his favor is erroneous. For the reasons stated it is clearly erroneous. In my opinion it is, however, not erroneous for the reasons advanced in Mr. Justice GIDEON'S opinion.

While the judgment should be reversed, it should, however, be reversed for the reasons I have stated, and the cause should be remanded to the district court of Salt Lake County, with directions to dismiss the action, but to do so without prejudice to a future action so that plaintiff may enforce payment of the deferred portion of his salary in case the defendant has made it impossible for it to comply with the conditions upon which it was to be paid.

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ACCORD AND SATISFACTION.

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ACTION.

1. "CAUSE OF ACTION"—ELEMENTS. An action involves a primary right and a primary duty, a breach of such right and duty, a remedial right and a remedial duty, and the remedy or relief, while a cause of action consists merely of the primary right, the primary duty, and the breach thereof. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.
2. SPLITTING CAUSES OF ACTION—BREACHES OF CONTRACT. Though there are many breaches of a single contract, they may not be split up into several causes of action. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.
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3. **UNDERTAKING ON APPEAL.** Undertaking held sufficient as one on appeal under Comp. Laws 1907, section 3306, though its terms are broad enough to also constitute it undertaking to stay execution under section 3307. *Peale v. Clark*, 83.
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5. **QUESTIONS NOT RAISED BELOW—DEFENSES.** If there was any reason why plaintiff should not have prevailed in his action at law to recover his share of the proceeds of the partnership business, it was

the duty of defendant to plead it as a defense, and, not having done so, he cannot complain on appeal. *Mills v. Gray*, 224.

6. **HARMLESS ERROR—FINDINGS OF FACT.** In partner's action against another to recover share in proceeds of shipment of ores belonging to partnership, mere fact that findings were expanded beyond issues was not prejudicial to defendant. *Mills v. Gray*, 224.
7. **REVERSAL—HARMLESS ERROR.** If defendant is not prejudiced in a substantial right, judgment for plaintiff cannot be reversed for mere technical errors. *Mills v. Gray*, 224.
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10. **REVIEW—DISPOSITION OF CAUSE.** Where it was more convenient to make and enter conclusions of law and judgment in district court, Supreme Court will do no more than indicate and direct what findings, conclusions of law, and judgments shall be, and remand. *Wheelwright v. Roman*, 10.
11. **REVIEW—EQUITY CASE.** In appeal in equity case, Supreme Court can review testimony to determine facts and equities of parties, though its views conflict with trial court's findings. *Lake Shore Duck Club v. Lake View Duck Club*, 76.
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17. **REVIEW—FINDINGS OF JURY.** In law case Supreme Court has no right to interfere with jury's findings on any substantial evidence,

but cannot permit judgment to stand unless based on findings based on some substantial evidence. *In re Hansen's Will*, 207.

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CAUSE OF ACTION. See "ACTIONS."

CONCLUSIONS OF LAW. See "JUDGMENTS."

CONSTITUTIONAL LAW.

1. **COURTS—LEGISLATIVE POWER—DELEGATION OF POWER TO CREATE COURTS.** Laws 1917, c. 107, is in violation of Const. art. 8, section 1, in that it delegates power to create municipal courts mentioned to city authorities. *State v. Barker*, 189.
2. **STATUTES—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY—DUAL MEANING.** In case change in act admits of dual meaning, meaning must be adopted which upholds act. *State v. Barker*, 189.
3. **PRESUMPTION OF CONSTITUTIONALITY.** Courts are not permitted to declare an act invalid unless it clearly, palpably, and beyond reasonable doubt contravenes some constitutional provisions. *State v. Barker*, 189.

4. **VALIDITY OF STATUTES.** The court will not declare a statute unconstitutional because of oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless such injustice is prohibited or the rights are guaranteed by the Constitution. *Rio Grande Lumber Co. v. Darke*, 114.
5. **JUDICIAL FUNCTIONS—POLICY OF EXPEDIENCE OF STATUTES.** In construing a statute when its validity is attacked on constitutional grounds, the courts will not consider questions of policy or expediency. *Rio Grande Lumber Co. v. Darke*, 114.
6. **LEGISLATIVE POWERS.** Except where the Constitution has imposed limits upon the legislative power, it is absolute whether it operates according to natural justice or not. *Rio Grande Lumber Co. v. Darke*, 114.
7. **PRESUMPTIONS IN FAVOR OF CONSTITUTIONALITY.** All reasonable doubt as to the constitutionality of a statute must be resolved in its favor. *Rio Grande Lumber Co. v. Darke*, 114.
8. **MECHANICS' LIENS—DUE PROCESS OF LAW—CONTRACTORS' BONDS.** Laws 1915, c. 91, requiring the owner of land desiring to contract for construction of a building for a price exceeding \$500 to obtain a bond from the contractor payable to the owner, conditioned for performance of the contract, and payment of accounts for labor and material, is not unconstitutional as depriving the landowner of due process of law. *Rio Grande Lumber Co. v. Darke*, 114.

CONTRACTS.

1. **CONSTRUCTION—RULES.** In construing a written contract, the court must consider all of its terms and relationship of parties to arrive at their actual intent. *Makris v. Melis*, 544.
2. **ADDITIONAL AGREEMENT—NECESSITY OF NEW CONSIDERATION.** Where a party is already bound to do a particular thing and refuses to perform until other party enters into a new agreement, the latter is not binding in the absence of a new consideration. *Smith v. Brown*, 27.
3. **BREACH OF CONTRACT—EVIDENCE.** In action for breach of an oral agreement under which plaintiff was to thresh defendant's grain, evidence and admissions of pleadings held to make prima facie case for plaintiff. *Tanner v. Johnson*, 23.
4. **CONTRACT TO THRESH GRAIN—RIGHT TO TERMINATE.** Under contract to thresh grain for defendant, that defendant renounced contract before time of performance did not preclude recovery. *Tanner v. Johnson*, 23.
5. **ARCHITECTS—COMMISSIONS—EXCESS COST.** In an action by an architect for a commission, held, that plaintiff was entitled to recover commissions on estimated cost notwithstanding increased cost over estimate. *Headlund v. Daniels*, 381.
6. **ILLEGALITY—RELIEF OF PARTIES.** Plaintiff, employee of mining company, who agreed with defendant to mine ores under lease made with mining company in defendant's name, held not debarred from recovering from defendant his share of proceeds of shipment of ores because rule of company forbade him to be interested in lease covering workings of company's mine. *Mills v. Gray*, 224.

CORPORATIONS.

1. **SUBSCRIPTIONS — VALIDITY — PROFITS FROM CORPORATE STOCK.** Agreement that plaintiff would look to profits from stock in payment for such stock purchased for himself and defendant in consideration of defendant managing the business was not illegal. *Smith v. Brown*, 27.
2. **SALE OF STOCK—CONTRACTS—CONSTRUCTION.** In view of Comp. Laws 1907, section 330, a contract for sale of corporate stock held to obligate defendants, sellers, to deliver shares. *Makris v. Melis*, 544.
3. **SAME—ACTION—DAMAGES.** Sellers of corporate stock who failed to deliver certificates cannot defeat actions for damages on ground that corporation subsequently became insolvent, where it was solvent for more than two years after sale, during which time shares were worth amount paid therefor. *Makris v. Melis*, 544.
4. **PROMOTION—ISSUANCE OF STOCK.** Where one corporation promoter was promised 8,200 shares of stock, should the corporation be organized, he could not complain that the stock was not issued to him, when the corporation was not organized, in the absence of proof that failure to organize it was due to the acts of the defendants. *Gray v. Bullen*, 270.
5. **ISSUE OF CERTIFICATES—WRONGFUL REFUSAL—PLEADING.** A complaint alleging that plaintiff's intestate subscribed for stock in defendant corporation, fully paid therefor by delivering to it quitclaim deed, and that defendant on demand refused to issue or deliver stock certificate to plaintiff's intestate, or to plaintiff as her administrator, states a cause of action, though it does not allege conclusion that plaintiff's intestate was entitled to stock, or character and amount of consideration paid therefor. *Coray v. Perry Irr. Co.*, 70.
6. **SAME—SAME—ACTION.** Action for damages will lie for wrongful withholding by corporation of stock certificate, in view of Comp. Laws 1907, section 330, recognizing use of stock certificates as muniments of title, and the form of action is immaterial, if complaint shows plaintiff entitled to any remedy, legal or equitable. *Coray v. Perry Irr. Co.*, 70.
7. **DIRECTORS — FRAUD — STATEMENT AS TO SOLVENCY.** Complaint against directors of corporation, personally, for deceit in representing financial condition of corporation, when they appointed plaintiff an agent, held to state cause of action. *Alder v. Crosier*, 437.
8. **SAME—SAME—DAMAGES—PLEADING.** In action for deceit in hiring plaintiff by corporation which soon went out of business, part of complaint alleging damages by reason of loss of profits that plaintiff would otherwise have made detracts nothing from plaintiff's an agent, held to state cause of action. *Alder v. Crosier*, 437.
9. **STATEMENTS OF OFFICERS—HIRING AGENTS—FRAUD—EVIDENCE.** In action for deceit, evidence held to sustain finding that president of insolvent corporation was guilty of deceit in hiring agent rendering him liable personally to agent for damages for loss of time. *Alder v. Crosier*, 437.

10. **DECEIT BY DIRECTORS OF INSOLVENT CORPORATION—HIRING AGENT—EVIDENCE.** That president, director of corporation, in hiring agent misrepresented corporation by reference to literature, did not render other directors of corporation personally liable for deceit to such agent in absence of evidence that they knew of literature or its issuance. *Alder v. Crosier*, 437.
11. **OFFICERS—COMPENSATION—CONSTRUCTION OF AGREEMENT.** Under agreement between corporation and its manager as to withholding part of salary theretofore paid, *held*, that the amount withheld was not to be paid until and unless sufficient ore to meet expenses was found. *Dunyon v. Scranton Mining & Smelting Co.*, 609.
12. **VENUE—PERSONAL PRIVILEGE—WAIVER—STATUTE.** Comp. Laws 1907, section 2931x1, relating to venue of transitory causes of action arising without the state, conferred mere personal privilege on corporation sued on cause of action arising without state, which could be waived by the corporation. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.
13. **SAME—PRIVILEGE—INVOCATION—STATUTE.** It required seasonable objection or motion in some form on part of defendant corporation, sued on cause of action arising without state, to invoke its privilege, under Comp. Laws 1907, section 2931x1, to be sued in county where it had principal place of business, etc., and to bring it within cognizance of court. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.
14. **SAME—RIGHT TO CHANGE—WAIVER.** Defendant corporation *held* to have waived privilege of change of place of trial by not renewing its motion therefor after it appeared in testimony that plaintiff was not bona fide purchaser of the cause of action a fact which defendant did not negative in its motion, and which entitled it to the change. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.
15. **INSOLVENT CORPORATIONS—TRUST FUND THEORY—APPLICABILITY.** Doctrine that assets of insolvent corporation constitute trust fund for payment of creditors pro rata and without preference is inapplicable in this state. *Passow & Sons v. Wetherbee*, 243.
16. **DEFUNCT CORPORATION—PREFERENCE OF CREDITORS.** Corporation which has forfeited charter for nonpayment of corporation tax under Laws 1909, c. 106, section 5, may in good faith make preferences among creditors so long as not interfered with in equitable proceedings. *Passow & Sons v. Wetherbee*, 243.
17. **POWERS OF PRESIDENT—NOTES AND MORTGAGES.** Where president who was also general manager of corporation was authorized to transact general business, power to execute note and mortgage will not be questioned, especially where he acts in good faith. *Passow & Sons v. Wetherbee*, 243.
18. **CREDITORS' SUITS.** Plaintiff could not, without offering to restore money paid, invoke aid of equity to have declared illegal foreclosure of mortgage of defunct corporation assigned to creditor who paid money therefor. *Passow & Sons v. Wetherbee*, 243.

COSTS.

COSTS ON APPEAL. Where on appeal plaintiff succeeded in modifying judgment against him on defendant's counterclaim, but prac-

tically plaintiff's whole record and brief are devoted to combatting a ruling of the court against him which was affirmed, costs should be awarded to neither party. *Jeremy Fuel & Grain Co. v. Meilen*, 49.

COURTS. See "CONSTITUTIONAL LAW."

CRIMINAL LAW.

SENTENCE—ENTERING JUDGMENT OF RECORD—STATUTE. In view of Comp. Laws 1907, section 5080, under section 5154, municipal court wherein defendant was charged with drunkenness did not lose jurisdiction of case, its sentence becoming illegal, on account of its failure to enter judgment of record for six days after sentence was rendered against defendant on his plea of guilty. *Kolb v. Peterson*, 450.

DAMAGES.

1. RENUNCIATION OF CONTRACT. The measure of damages for renunciation of contract to thresh grain was net profit thresher would have realized had he been permitted to do threshing. *Tanner v. Johnson*, 23.
2. AGGRAVATION. Where servant's broken leg was set, but in his delirium cast was broken, and bones could not be reset without loss of leg, and new cast was put on, amount awarded servant should not be diminished because of anything physicians did or failed to do. *Farnon v. Silver King Coalition Mines Co.*, 295.
3. SPECULATIVE OR PROBLEMATIC—CERTAINTY. Income of agent dependent upon his ability to induce people to buy land contracts is too problematical and speculative to be basis of damages for wrongful termination of agency. *Alder v. Crosier*, 437.

DRUNKARDS.

OFFENSE—PROHIBITION. By the Prohibition Law, section 21, drunkenness and intoxication by use of intoxicating liquors are criminal, wherever and whenever they may occur at any place in state. *Kolb v. Peterson*, 450.

EMINENT DOMAIN.

1. DECISIONS REVIEWABLE—"FINAL JUDGMENT." In a proceeding to condemn land, where a judgment does not allow condemnation of a substantial part of the land desired, the plaintiff may appeal therefrom before damages are assessed. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.
2. COAL COMPANIES—TIPPLE SITES. Coal Companies, under the statute, may condemn ground for a tippie site. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.
3. PROPERTY SUBJECT—RAILROAD RIGHTS OF WAY. A coal company cannot condemn any portion of a right of way used for railroad purposes for a tippie site, either under the law generally, or under Comp. Laws 1907, section 3590, subsec. 5, relating to crossings, intersections, and connections. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.

4. **COAL COMPANIES—DEDICATED RIGHTS OF WAY.** Although a track departs from a right of way, it cannot be approached, by a coal company condemning land for a tippie site, so close as to interfere with traffic, and five feet is held not an unreasonable minimum distance. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.

ESTOPPEL.

1. **AFTER—ACQUIRED TITLE—CONVEYANCES BEFORE PATENT.** One who conveys coal lands, before he has applied to the government to purchase the same, conveys a good title thereto, if he subsequently acquires the land, under Comp. Laws 1907, section 1979, relating to after-acquired titles. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.
2. **SALES OF LAND—PERSON CLAIMING UNDER VENDOR.** One who is claiming with full knowledge of the facts, under a person who has sold land and abided in the sale for twenty-five years, and the land has been improved, is estopped to deny that the transfer is valid. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.
3. **ESTOPPEL OF MUNICIPALITY—LAND AS PART OF STREET.** City held estopped from claiming as public street premises lying without 66-foot width of street, as shown on map filed with city council for approval by claimants of property, plaintiff's predecessors, city attorney and council having approved claimant's title, and city having possessed land for taxes. *Wall v. Salt Lake City*, 593.

EVIDENCE. See "ALTERATION OF INSTRUMENTS," "PRINCIPAL AND SURETY."

1. **EXTENT OF INJURIES.** Injured servant could not testify that when he applied for work after injury, defendant's manager said that they would not feel safe with him at work, owing to his defective sight caused by injury. *White v. Utah Condensed Milk Co.*, 278.
2. **ADMISSION OF SERVANT—ADMISSIBILITY.** Admissions of the employer's general manager, outside scope of employment as to extent of servant's injuries, are not admissible against employer. *White v. Utah Condensed Milk Co.*, 278.
3. **SANITY OF TESTATOR—OPINION EVIDENCE.** Though it is proper to permit witnesses, testifying on probate of a will, on the subject of mental incapacity, after detailing the facts, to express an opinion respecting testator's sanity on the date of execution, the facts on which the opinion is based should be relevant to the issue, and not too remote in point of time. *In re Hansen's Will*, 207.
4. **CAPACITY AND UNDUE INFLUENCE—OPINION TESTIMONY.** Though great latitude is necessarily permitted as to evidence on mental capacity and undue influence, courts should confine evidence within reasonable limits, and opinions of lay witnesses should not be permitted unless witnesses possess personal knowledge of facts on which opinions are based. *In re Hansen's Will*, 207.
5. **OPINION TESTIMONY—INSANITY OF TESTATOR.** In will contest, opinion testimony of lay witnesses as to testator's insanity, held inadmissible as based on facts too remote. *In re Hansen's Will*, 207.
6. **LOST WILLS—RECORDS.** Records in county clerk's office of lost will were not competent independent evidence of provisions of will. *In re Frandsen's Will*, 156. *

7. **CONDITION PRECEDENT TO EXECUTION OF NOTE.** Under the Negotiable Instruments Act, as between original parties, defendant could prove that note sued on was delivered upon condition. *Smith v. Brown*, 27.
8. **PAROL EVIDENCE—SUBSEQUENT AGREEMENT.** Where lease provided for plowing and cropping farm every alternate year, proof of subsequent parol agreement as to raising and dividing a crop in one of the intervening years held not to vary or contradict the written lease. *Jensen v. Anderson*, 515.
9. **CONCLUSIVENESS ON PARTY INTRODUCING.** Where the testimony of witnesses introduced by plaintiffs was uncontradicted, plaintiffs were bound thereby. *Kent v. Ogden, L. & I. Ry. Co.*, 328.

EXCEPTIONS, BILL OF.

1. **TIME TO FILE.** Where defendants moved separately for new trials, without serving on each other notice of intention to do so, time for filing and serving bill of exceptions commenced to run from time the order was made striking such motions. *Jones v. Williamson*, 444.
2. **SETTLEMENT AFTER TIME.** The bill of exceptions being settled, without any extension of time, after the time allowed by statute therefor, and therefore without jurisdiction, is without any force or effect. *McEwan v. Anderson*, 317.

EXECUTORS AND ADMINISTRATORS.

COLLECTION OF ASSETS—POWER TO SUE. Under Comp. Laws 1907, sections 3912, 3915, an administrator may demand of corporation stock to which intestate was entitled, or bring action for damages for its failure to issue stock. *Coray v. Perry Irr. Co.*, 70.

FAILURE OF CONSIDERATION. See "VENDOR AND PURCHASER."

FINDINGS. See "APPEAL AND ERROR."

FORECLOSURE. See "MECHANICS' LIENS."

FRAUD.

CONTRACTS OF HIRING—MEASURE OF DAMAGES. Where one is deceived into contract on commission basis, damages for deceit are not measured by contract, but by reasonable value of his services. *Allder v. Crosier*, 437.

FRAUDS, STATUTE OF.

PAROL PARTITION OF REALTY. Parol partition between joint owners of realty, such as partners, when carried out and followed by actual possession in severalty, is valid, and will be enforced notwithstanding statute of frauds. *Allen v. Allen*, 104.

INHERITANCE TAX. See "TAXATION."

INSANITY. See "TRIAL."

INSTRUCTION. See "TRIAL."

INSURANCE.

1. **MUTUAL BENEFIT ASSOCIATION—DESIGNATION OF BENEFICIARY—VALIDITY.** Where the laws of a union required designation of beneficiary to be in writing and witnessed, a designation in writing of the mother of insured, but unwitnessed when accepted by union, was valid, and the wife of the member whom he subsequently married was not entitled to the fund under provision that in the absence of designation the wife should be the beneficiary. *Zenger v. Cigarmakers' Union No. 224 of Cigarmakers' International Union of America*, 390.
2. **DELIVERY—SUFFICIENCY.** In view of wording of receipt and payment of premium on date of application, *held*, that life policy sent to agent who took application was delivered, although never received by insured. *Lombard v. Columbia Nat. Life Ins. Co.*, 554.
3. **CAUSE OF DEATH—PROOF—SUFFICIENCY.** That, after insured's physician had advised him that his disease was incurable, insured voluntarily stated that he had been suffering with his stomach and pains in his back, would not, standing alone, prove nature of disease that caused insured's death. *Lombard v. Columbia Nat. Life Ins. Co.*, 554.

JOINDER OF CAUSES. See "ACTION."

JUDGMENT.

1. **PRAYER FOR GENERAL RELIEF—RELIEF AWARDED.** Where a husband was sued by administratrix of his wife for property conveyed to him by instruments executed by intestate of which he received possession after her death, although answer contained a prayer for general relief only, he was entitled to such specific relief as pleadings and evidence authorized. *Wheelwright v. Roman*, 10.
2. **RES ADJUDICATA—QUESTION FOR JURY.** Court may determine question of res adjudicata as a question of law where there is no dispute regarding effect of matters or controversies in either former or the instant action. *Jeremy Fuel & Grain Co. v. Mellen*, 49.
3. **CONCLUSIVENESS—RES ADJUDICATA.** In action on nonnegotiable note given in consideration of a crusher and motor, adjudication in a former action between same parties that plaintiff was not owner of such property *held* res adjudicata of his right to recover in instant case. *Jeremy Fuel & Grain Co. v. Mellen*, 49.
4. **SAME—SAME.** In action on a nonnegotiable note given in consideration of crusher and motor, fact that finding in former action between parties quieting title to crusher and motor in this defendant went beyond allegations in his answer in instant case will not prevent former case being res adjudicata of question of ownership of consideration for note. *Jeremy Fuel & Grain Co. v. Mellen*, 49.
5. **SAME—SAME.** In action on nonnegotiable note in which a prior action quieting title in defendant to consideration of note was res adjudicata and barred plaintiff's recovery on note, defendant's counterclaim in instant case for recovery of payment on note is barred by his failure to raise such issue in former action. *Jeremy Fuel & Grain Co. v. Mellen*, 49.
6. **COSTS ON APPEAL.** Under Comp. Laws 1907, section 2970, where defendant in action to foreclose a chattel mortgage lien on crusher

and motor, in which he was adjudged to be owner of such property, failed to set up a counterclaim for payment made on a note given by him to plaintiff in consideration of such property, he may not later set up a counterclaim to recover such payment in an action on the note. *Jeremy Fuel & Grain Co. v. Mellen*, 49.

7. **DEFAULT—PENDENCY OF MOTION.** Under Comp. Laws 1907, section 3179, subd. 1, a motion to require plaintiff to separately state his causes of action is sufficient to prevent the entry of default. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.
8. **ENTRY—PROVISIONS.** Provisions of Comp. Laws 1907, section 3181, subd. 6, are directory, and failure of plaintiff to demand entry of judgment within six months after court rendered its oral decision does not preclude court from thereafter entering judgment for plaintiff. *Headlund v. Daniels*, 381.
9. **CONCLUSIONS OF LAW AND FINDINGS.** Where, had court rendered judgment in accordance with findings, judgment for plaintiff would have been for \$1,742.98 rather than for \$671.50, with interest, for which judgment was rendered, conclusions of law, palpably at variance with findings, and failure to render judgment in accordance with findings were error. *Parrott Bros. Co. v. Ogden City*, 512.

LANDLORD AND TENANT.

1. **RENTING ON SHARES—ACTIONS—PLEADINGS.** In landlord's action for share of crop grown under agreement for division, complaint held sufficient to show plaintiff's immediate right to possession when the action was instituted. *Jensen v. Anderson*, 515.
2. **SAME—LEASE—CONSIDERATION FOR MODIFICATION.** Where lease provided for cultivating farm in alternate years, right given tenant to raise crop in an intervening year held a consideration for agreement as to division of the crop. *Jensen v. Anderson*, 515.
3. **RENT FOR PROPERTY LEASED BY CITY—EVICTION BY ORDINANCE.** Where city leased premises for bathing resort with provision that portion might be sublet for saloon purposes, the fact that subsequently, pursuant to Laws 1911, c. 106, city by ordinance prohibited saloon business on such premises, did not constitute an eviction or release from paying rent or entitle him to any abatement thereof. *Warm Springs Co. v. Salt Lake City*, 58.
4. **LEASE BY CITY—STATUTE.** Generally a tenant may not hold possession of premises, and then sue for abatement of rent on theory of partial eviction. *Warm Springs Co. v. Salt Lake City*, 58.
5. **RENT—PARTIAL EVICTION.** If city should guarantee its lessee right to continue saloon business in violation of Laws 1911, c. 106, providing that licenses permitting sale of intoxicating liquors should not be issued outside limits of business district of city or town, and requiring cities to pass ordinances fixing such limits, lease would be void. *Warm Springs Co. v. Salt Lake City*, 58.

LIBEL AND SLANDER.

1. **PLEADING.** In action for libel by writing plaintiff's wife by implication that he had illicit relations with another woman, where letter complained of as defamatory expressly referred to and named plaintiff, it was not necessary that amended complaint allege words were written to plaintiff. *Burton v. Mattson*, 133.

2. **CONDITIONAL PRIVILEGE—STATUTE.** Under Comp. Laws 1907, section 4204, where defendants, unrelated to plaintiff, wrote to plaintiff's wife in such terms as to imply that he had illicit relations with another woman, communications were not conditionally privileged. *Burton v. Mattson*, 133.
3. **PLEADING MALICE.** Complaint, in action for libel, alleging matters contained in libelous letters were false and libelous, sufficiently alleged communications were made with malice. *Burton v. Mattson*, 133.
4. **PLEADING—COMPLAINT—STATUTE.** Under Comp. Laws 1907, section 2994, in action for libel, complaint *held* not insufficient as containing no inducement, colloquium, or proper innuendoes. *Burton v. Mattson*, 133.

LIMITATIONS OF ACTIONS.

STATUTE OF LIMITATIONS—APPLICATION TO MUNICIPALITY—STREET. There is no bar of limitations in Utah against a municipality in respect to a public street within its boundaries. *Wall v. Salt Lake City*, 593.

MASTER AND SERVANT.

1. **CONTRACT OF EMPLOYMENT—CONSTRUCTION—INTENT.** In construing contract of employment as to compensation, controlling question *held* the intent of the parties as gathered from the language, the situation of the parties, and the subject-matter. *Dunyon v. Scranton Mining & Smelting Co.*, 609.
2. **DUTY OF INSPECTION—STATUTORY REGULATIONS.** Comp. Laws 1907, section 1518, subd. 3, as amended by Laws 1913, c. 78, as to examination of mines known to generate explosive gases, *held* applicable whether or not gases existed in sufficient quantity to make mine unsafe or dangerous. *Eleganti v. Standard Coal Co.*, 585.
3. **HAZARDOUS UNDERTAKINGS—DUTY TO WARN.** If plaintiff was not skilled in use of powder in blasting, he should have informed defendant mining company thereof. *Olsen v. Triangle Mining Co.*, 521.
4. **SAME—RULES.** Master is not justified in conducting hazardous and complicated business without rules calculated to lessen risks of his servants. *Olsen v. Triangle Mining Co.*, 521.
5. **SAME—SAME.** Rule that master must adopt rules for hazardous work is not applicable where servant sufficiently matured in years and competent is engaged in performance of all duties attending the work. *Olsen v. Triangle Mining Co.*, 521.
6. **ACTION FOR INJURY—EVIDENCE—SUFFICIENCY.** In action by employee for injuries sustained while blasting, *held* under evidence that promulgation of rules by master would not have avoided accident. *Olsen v. Triangle Mining Co.*, 521.
7. **DUTY TO PROMULGATE RULES—NEGLIGENCE.** In absence of evidence showing that rules would be useful under circumstances, master cannot be found negligent in not having promulgated them. *Olsen v. Triangle Mining Co.*, 521.
8. **INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.** In action for injuries due to explosion of blasting charge, *held*, that

plaintiff failed to take precautions for himself that miners generally take. *Olsen v. Triangle Mining Co.*, 521.

9. **SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** In action by mining employee for injuries due to explosion of blast, evidence *held* insufficient to show negligence of employer contributing to injury complained of. *Olsen v. Triangle Mining Co.*, 521.
10. **RELATION OF PARTIES—TERMINATION.** Where coal mining company transported its men from their working places to the surface in cars, *held*, that the relation of master and servant continued until they left the cars and were no longer under the company's control. *Whalen v. Union Pacific Coal Co.*, 455.
11. **LIABILITY FOR INJURIES—ELECTRICAL APPLIANCES.** Mining company *held* not negligent by reason of position of trolley wire in connection with electric railway on which its men were transported, where to increase the height of the trolley would have created a greater danger. *Whalen v. Union Pacific Coal Co.*, 455.
12. **SAME—SAME.** Coal mining company *held* not negligent in failing to guard trolley wire of electric railway, because to do so would increase rather than diminish the danger incident to the use of the road. *Whalen v. Union Pacific Coal Co.*, 455.
13. **SAME—DEGREE OF CARE REQUIRED.** A master is not required to use more than ordinary care and diligence to provide his servant reasonably safe ways of ingress and egress to and from the place of work. *Whalen v. Union Pacific Coal Co.*, 455.
14. **SAME—CUSTOMARY APPLIANCES.** Master performs duty by providing instrumentalities, appliances, and safeguards in common use by others, and which are reasonably safe and suitable for use for which they are intended. *Whalen v. Union Pacific Coal Co.*, 455.
15. **ASSUMPTION OF RISK—ELECTRICAL APPLIANCES.** Mine employee familiar with position of trolley wire with reference to cars on which the men are carried, *held* to assume the risks and dangers, all of which were obvious. *Whalen v. Union Pacific Coal Co.*, 455.
16. **LIABILITY FOR INJURIES—WARNING—FAILURE TO COMPEL OBEDIENCE.** Mining company, having man to warn men boarding cars of electric railway to wait until current was turned off, *held* not required to use physical force in order to be relieved of liability for death. *Whalen v. Union Pacific Coal Co.*, 455.
17. **CONTRIBUTORY NEGLIGENCE—TAKING DANGEROUS POSITION.** Mine employee who boarded car over the end instead of the side merely to avoid inconvenience of waiting ten or fifteen minutes, and thereby coming in contact with trolley wire, *held* negligent. *Whalen v. Union Pacific Coal Co.*, 455.
18. **ACTION FOR INJURIES—DEGREE OF CARE—"ORDINARY CARE."** Employer maintaining electric wires need not exercise the "greatest care and prudence to prevent injury." *Whalen v. Union Pacific Coal Co.*, 455.
19. **ASSUMPTION OF RISK—PROMISE TO REMEDY DEFECTS.** Where master promises to remedy defect known to servant, he is liable for

injuries to servant caused by such defect, for at least reasonable time, unless danger is evident. *White v. Utah Condensed Milk Co.*, 278.

20. **QUESTIONS FOR JURY—ASSUMPTION OF RISK—PROMISE TO REMEDY.** Where servant testified that master promised to provide guard for steam gauge; that he relied thereon—whether there was such promise and whether servant relied thereon was for jury. *White v. Utah Condensed Milk Co.*, 278.
21. **SAME—SAME—OBVIOUS RISKS.** Ordinarily it is for jury whether danger is so imminent and obvious that man of ordinary prudence would not have continued in employ notwithstanding promise. *White v. Utah Condensed Milk Co.*, 278.
22. **SAME—SAME—SAME.** Evidence held not to warrant saying as matter of law that injured servant assumed risk notwithstanding master's promise to remedy danger. *White v. Utah Condensed Milk Co.*, 278.
23. **INSTRUCTIONS—ASSUMPTION OF RISK—OBVIOUS RISKS.** Refusal of requested instruction precluding recovery if danger was so obvious that person of ordinary prudence would not have incurred it, notwithstanding which the servant continued work, held erroneous. *White v. Utah Condensed Milk Co.*, 278.
24. **"FELLOW SERVANT."** Two miners working on different levels in mine are not working at "same place," and are not fellow servants within Comp. Laws 1907, section 1343. *Shields v. Silver King Coalition Mines Co.*, 128.
25. **PLEADING—COMPLAINT—SUFFICIENCY.** Mine servant's complaint for injuries in falling hoist held sufficient. *Farnon v. Silver King Coalition Mines Co.*, 295.
26. **INJURIES TO SERVANT—VICE PRINCIPAL.** Engineer whose duty was to operate mine hoist carrying miners to and from lower level was, as to such miners, vice principal, for whose acts operator was liable. *Farnon v. Silver King Coalition Mines Co.*, 295.
27. **SAME—PLEADING.** It is not objectionable to charge mine owner and hoist operator with negligence in injuring miner by dropping the hoist, hoist operator being vice principal. *Farnon v. Silver King Coalition Mines Co.*, 295.
28. **SAME—FELLOW SERVANT.** Engineer whose duty was to operate mine hoist carrying miners to and from lower level was not, as to miner injured by negligent dropping of cage, fellow servant. *Farnon v. Silver King Coalition Mines Co.*, 295.
29. **QUESTION FOR JURY—HAPPENING OF ACCIDENT.** It is negligence as matter of law for electrically operated hoist cage in mine to be dropped 110 feet without brake or clutch, with such force as to injure miner therein, though case is not strictly one of *res ipsa loquitur*. *Farnon v. Silver King Coalition Mines Co.*, 295.

MECHANICS' LIENS. See "CONSTITUTIONAL LAW."

1. **ENFORCEMENT OF LIEN—PARTIES.** Under Mechanics' Lien Law, any person who claims a mortgage on premises on which mechanics' liens are sought to be foreclosed in an action in equity may be made

a party, and his right to claim a lien may be litigated. *Badger Coal & Lumber Co. v. Olsen*, 307.

2. **FORECLOSURE—SURPLUS—MORTGAGES.** Mortgage having acquired interest after accrual of mechanics' lien, held entitled to surplus remaining after liens were satisfied. *Badger Coal & Lumber Co. v. Olsen*, 307.

MINES AND MINERALS.

1. **ACQUISITION AND TRANSFER BY ONE DISQUALIFIED FROM HOLDING TITLE.** One disqualified from holding title to coal lands may receive a title from a person having it, and transfer it to another who can lawfully take it. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.
2. **MINING PARTNERSHIP—ACTIONS.** In partner's action against another to recover share in proceeds of shipment of ores belonging to partnership, court's findings of fact held sufficient to sustain judgment for plaintiff. *Mills v. Gray*, 224.

MORTGAGES.

MECHANICS' LIENS—PRIORITY. Mechanics' liens held superior to mortgages taken after liens accrued. *Badger Coal & Lumber Co. v. Olsen*, 307.

MOTIONS. See "PLEADING."

MUNICIPAL CORPORATIONS.

1. **RENT FOR PROPERTY LEASED BY CITY—EVICTION.** While city in entering into lease did so as proprietor, and is governed by same law as other proprietors, in passing ordinance, under Laws 1911, c. 106, it acted in governmental capacity, and is not liable for consequences of such governmental act. *Warm Springs Co. v. Salt Lake City*, 58.
2. **ACTIONS AGAINST—PRESENTMENT OF CLAIM—STATUTE.** Plaintiff, before suing defendant city to quiet title to premises claimed by city as part of street, for damages, and for injunctive relief, was not required to present her claim for damages to city council, as provided in Comp. Laws 1907, sections 312, 313. *Wall v. Salt Lake City*, 593.

NEGLIGENCE.

1. **INJURIES TO TRAVELERS—JOINT ADVENTURE—IMPUTED NEGLIGENCE.** Where plaintiff and owner of an automobile agreed upon a trip at joint expenses, and the automobile was struck by a train, plaintiff was a joint adventurer, and as such the negligence of the owner of the car in driving it upon the track was imputed to him. *Derrick v. Salt Lake & O. Ry. Co.*, 573.
2. **CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.** Contributory negligence is a question for the court, where there is but one reasonable inference to be drawn from the facts and circumstances disclosed by the testimony. *Steggell v. Salt Lake & U. R. Co.*, 139.
3. **VARIANCE—CONTRIBUTORY NEGLIGENCE.** In determining the question of contributory negligence, the jury are not limited to the acts of negligence described in the complaint, but may consider any fact, inference, or circumstance disclosed by the evidence. *Kent v. Ogden, L. & I. Ry. Co.*, 328.

NEW TRIAL. See "APPEAL AND ERROR."

1. NOTICE OF MOTION—TIME FOR FILING—STATUTE. Under Comp. Laws 1907, section 3294, proponents' second notice of motion for new trial, filed more than five days after jury returned special verdict, though within five days after judgment denying probate was entered, was properly stricken from files as filed too late. *In re Hansen's Will*, 207.
2. MOTION—NOTICE—REQUISITES. Comp. Laws 1907, section 3294, requiring party intending to move for new trial to serve upon the adverse party notice of such intention, does not require such notice between codefendants, all of whom joined in preparing bill of exceptions and in serving it, and also joined in the appeal and were properly before court. *Jones v. Williamson*, 444.
3. EXCESSIVE DAMAGES—REMITTITUR INSTEAD OF NEW TRIAL. That verdict for death is excessive *held* not alone sufficient to show passion or prejudice so as to require new trial instead of remittitur. *Elegant v. Standard Coal Co.*, 585.

NUISANCE.

POISONOUS GAS—INJURY TO ANIMALS. In action for damages to live stock and crops alleged to have been caused by operation by defendant of smelter emitting poisonous gases, evidence *held* insufficient to show that death or sickness of animals was caused by alleged operation. *Sagers v. International Smelting Co.*, 423.

OPTION. See "VENDOR AND PURCHASER."

PARTNERSHIP.

ACTION AT LAW BETWEEN PARTNERS. Where there are no partnership liabilities, and there is nothing requiring accounting between partners, one can maintain action against other to recover share of proceeds of partnership business. *Mills v. Gray*, 224.

PLEADING. See "ACTION," "ALTERATION OF INSTRUMENT," "LIBEL AND SLANDER," "MASTER AND SERVANT."

1. MOTIONS—SEPARATING CAUSES OF ACTION. Under Comp. Laws 1907, sections 2961, 2962, objection that causes of action are not separately stated may be raised by motion. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.
2. SAME—SAME. In action by purchaser of lots in a townsite, failure to survey, plat, and record the lots and to furnish abstracts, deeds, and bonds, *held* but one cause of action, and not required to be separately stated by Comp. Laws 1907, section 2961. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.
3. SEPARATE CAUSES OF ACTION—SEPARATE STATEMENT. A motion to require plaintiff to separately state distinct causes of action was too indefinite where it was not specific as to the causes of action which defendant claimed the complaint contained. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.
4. SAME—SAME. In action by vendee of townsite lots for breaches of contract by corporate vendor, cause of action against either defendants for appropriating certain proceeds of sales *held* required

to be separately stated by Comp. Laws 1907, section 2961. *Felt City Townsite Co. v. Felt Inv. Co.*, 364.

5. **MOTIONS—JUDGMENT ON PLEADINGS—EFFECT AS DEMURRER.** While a defendant's motion for judgment on the pleadings is not strictly proper, such motion may be treated as a general demurrer. *Coburn v. Bartholomew*, 566.
6. **AMENDMENT OF COMPLAINT—EFFECT.** In action against railroad for damages to shipment of horses, verdict *held* not excessive on ground that plaintiff's amendment of complaint to limit territory within which damages were claimed, thus eliminating horse injured outside territory, reduced damages claimed below amount of verdict. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.
7. **ANSWER—VERIFICATION.** Under Comp. Laws, 1907, section 2984, verification of defendant's answer as "true to the best of his knowledge, information, and belief" verified no direct or positive denial of the truth of allegations of complaint. *Brewer v. Romney*, 236.
8. **SEPARATE STATEMENT—DISTINCT CAUSES OF ACTION IN ONE COURT.** Complaint in stockholders' action *held* to improperly join in a single statement causes of action to enjoin and set aside different assessments on the stock of the corporation. *Blake v. Boston Development Co.*, 347.
9. **SEPARATE STATEMENT OF CAUSES.** In action by corporation or stockholders against officers for accounting, *held* that wrongful acts charged against the same individuals may be incorporated in one statement in the complaint, however numerous or involved. *Blake v. Boston Development Co.*, 347.
10. **MATTERS IN ISSUE UNDER PLEADINGS—IMMATERIAL EVIDENCE.** In action for injury sustained in mine, *held*, where ownership of mine was alleged by plaintiff and denied by defendant, defendant could show that its interest was leasehold. *Olsen v. Triangle Mining Co.*, 521.

PRESCRIPTIVE RIGHTS. See "WATERS AND WATER COURSES."

PRESUMPTIONS. See "APPEAL AND ERROR."

PRINCIPAL AND SURETY.

1. **EVIDENCE—BURDEN OF PROOF.** In action against surety of a buyer to recover alleged balance due for merchandise sold, burden was on plaintiff to show that statement of accounts between it and buyer was correct. *Fred Miller Brewing Co. v. Gaudio*, 66.
2. **SAME—SUFFICIENCY.** In action against surety of a buyer to recover alleged balance due for merchandise sold, evidence *held* to justify a finding that plaintiff failed to prove indebtedness owing to it by buyer. *Fred Miller Brewing Co. v. Gaudio*, 66.

PUBLIC LANDS.

1. **ENTRY—ASSIGNMENT—VALIDITY.** Act of Congress, March 28, 1908, Sec. 2, providing that no assignment of entry should be allowed except to an individual qualified to make entry, does not invalidate the contract of an entryman to convey the land upon which he entered after due proofs were completed. *Coburn v. Bartholomew*, 566.

2. DECISIONS OF LAND OFFICE—COLLATERAL ATTACK. In the absence of fraud, the findings and decisions of the officers of the land office in a contest cannot be collaterally attacked by one claiming through the predominating party in such contest. *Ketchum Coal Co v. Pleasant Valley Coal Co.*, 395.
3. CONVEYANCE TO DISQUALIFIED PERSONS—STATUTES. U. S. Comp. St. 1916, section 5025, making void land entered by one for another, has no bearing, where the patent was lawfully acquired, but was conveyed to one disqualified from holding title. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.
3. RIGHTS OF WAY—PURPOSES AND USES. A right of way granted by Congress and devoted to transportation by a common carrier cannot, either with or without the consent of the carrier, be devoted to permanent structures such as tipples for a coal company. *Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 395.

RAILROADS.

PERSONS ON TRACK—DUTY OF TRAIN OPERATORS. The operators of a train may assume a mature and sound person, walking on the track toward a train a mile distant when he went on the track, will see and hear and avoid it. *Steggell v. Salt Lake & U. E. Co.*, 139.

RATIFICATION. See "ALTERATION OF INSTRUMENTS."

REPLEVIN.

COMPLAINT—OWNERSHIP AND RIGHT OF POSSESSION. In view of Comp. Laws 1907, section 3046, as to required allegation in affidavit in replevin, the complaint, alleging in the present tense ownership and right of possession, *held* sufficient, though action is commenced, as allowed by section 2938, by filing complaint, and it is filed a few days after its verification. *James v. Jensen*, 485.

RES ADJUDICATA. See "JUDGMENTS."

SALES. See "VENDOR AND PURCHASER."

1. WARRANTY—LANGUAGE CONSTITUTING EXPRESS WARRANTY. Where defendant applied to plaintiff for automobile for disclosed purpose, statements of plaintiff's salesman *held* an express warranty that the car would run, though it was a secondhand car. *Studebaker Bros. Co. of Utah v. Anderson*, 319.
2. RIGHT TO RESCIND—BREACH OF WARRANTY. Buyer *held* entitled to rescind for breach of warranty and recover back purchase price instead of suing for difference in value by reason of the breach. *Studebaker Bros. Co. of Utah v. Anderson*, 319.
3. SAME—WAIVER. Buyer of automobile *held* not to have waived right to require bond from contractor on school building provided for in opportunity to put it in condition to run. *Studebaker Bros. Co. of Utah v. Anderson*, 319.
4. BREACH OF WARRANTY—RETURN OF GOODS—QUESTIONS FOR JURY. Where evidence was in conflict, *held* that it was question for jury whether the buyer returned automobile for repairs or because it did not comply with warranty. *Studebaker Bros. Co. of Utah v. Anderson*, 319.

SCHOOLS AND SCHOOL DISTRICTS.

1. PUBLIC SCHOOLS—TAXATION—ASSESSMENT—"AND." Limitation on tax rate for school purposes prescribed by Laws 1915, c. 111 which modified Comp. Laws 1907, section 1936, as amended by Laws 1915, c. 115, *held* invalid as to cities of first class, provision for limitation according to assessed valuation of property applying to such cities. *Board of Education of Salt Lake City v. Hanchett*, 289.
2. CONSTRUCTION OF BUILDINGS—REQUIREMENT OF BOND—LIABILITY. School district *held* not liable for failure to require bond from contractor on school building provided for in Laws 1909, c. 68, section 1. *New York Blower Co. v. Carbon County High School*, 342.
3. SAME—SAME—SAME. Boards of trustees *held* not liable for failure to require bond from contractor on school building provided for in Laws 1909, c. 68, section 1.—*New York Blower Co. v. Carbon County High School*, 342.

SET-OFF AND COUNTERCLAIM.

PARTNERSHIP TRANSACTIONS. Counterclaim for half price of water rights deeded by parties and others, price of which was received by plaintiff, *held* not to show grantors were partners, and so not demurrable as on claim arising out of unsettled partnership accounts. *Peale v. Clark*, 83.

STATUTES. See "CONSTITUTIONAL LAW."

1. CONSTRUCTION. While all statutes in *pari materia* should be construed together, yet where two statutes relating to same subject-matter are repugnant, and cannot be reconciled, later must be accepted as legislative will. *Board of Education of Cache County School Dist. v. Daines*, 97.
2. SURPLUSAGE—DISREGARD. Preposition "in," in Laws 1917, c. 107, providing "that in all cities of" state having certain population, inhabitants may create by ordinance court is mere surplusage, and will be disregarded. *State v. Barker*, 189.
3. INVALIDITY IN PART. Where act amending several sections of Compiled Statute so as to make amendatory act conform to new condition contemplated and amendment is invalid as to one section, it must also be held invalid as to all. *State v. Barker*, 189.
4. REPEAL—UNCONSTITUTIONAL STATUTE—EFFECT. Where amendatory act repealing former law upon same subject is invalid on constitutional grounds, amendatory act is impotent to repeal old law. *State v. Barker*, 189.

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TAXATION.

1. SCHOOL TAXES—COMPENSATION. Despite Comp. Laws 1907, section 616x3, first enacted in Laws 1903, c. 131, *held* that, under Comp. Laws 1907, section 1891x27, first enacted in Laws 1905, c. 107, and amended by Laws 1911, c. 135, Laws 1913, c. 96, and Laws 1915, c. 78, no deduction can be made from school taxes assessed under

latter statute for expenses of assessment and collection. *Board of Education of Cache County School Dist. v. Daines*, 97.

2. **INHERITANCE TAXES — COMPUTATION — STATUTES — CONSTRUCTION.** Under Comp. Laws 1907, section 1220x, as amended by Laws 1915, c. 98, as to the assessment of inheritance taxes, an estate worth in excess of \$25,000 must be assessed three per cent. upon \$15,000, and five per cent. upon the balance. *In re Hone's Estate*, 92.

TRADE UNIONS.

1. **EXPULSION OF MEMBERS—RIGHTS.** An expelled member of trade association is only entitled to a hearing in accordance with laws and rules of association. *Pratt v. Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 472.
2. **SAME—NECESSITY OF NOTICE.** The expulsion of a member of a trade association without notice or opportunity to be heard is void. *Pratt v. Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 472.
3. **SAME—REVIEW BY COURT.** Where plaintiff was not expelled from a trade association without a hearing, court will not review and annul officer's acts. *Pratt v. Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 472.
4. **ACTS OF OFFICERS—REVIEW BY COURT.** Court would not interpret provisions of constitution of a trade association regarding transfer of membership, this being the officers' duty. *Pratt v. Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 472.
5. **REINSTATEMENT OF EXPELLED MEMBER—ACTION AGAINST UNION.** The court will not compel reinstatement of expelled member of trade association where owing to nonresidence of defendants decree could not be enforced. *Pratt v. Amalgamated Ass'n of Street and Electric Ry. Employees of America*, 472.

TRIAL.

1. **INSTRUCTIONS.** When the court granted motion for nonsuit in an action by an automobile passenger against a railroad on counts alleging negligent dangerous speed and failure to give warning, it was error thereafter in the charge to submit such questions to the jury. *Derrick v. Salt Lake & O. Ry. Co.*, 573.
2. **INSTRUCTIONS—APPLICABILITY TO EVIDENCE—DAMAGES.** Court erred in refusing to withdraw from jury consideration of damages on account of truck garden damaged or destroyed, where there was no evidence of cost of harvesting same. *Sagers v. International Smelting Co.*, 423.
3. **SAME—SAME—SAME.** Where net damages to grapevines for years alleged in complaint could not be ascertained from evidence, court erred in not withdrawing from jury consideration of damages to same. *Sagers v. International Smelting Co.*, 423.
4. **INSTRUCTIONS—SINGLING OUT EVIDENCE OR FACTS.** The court should not name the specific things or acts which the jury may consider in determining contributory negligence, but tell them to determine the question from a consideration of the whole evidence. *Kent v. Ogden, L. & I. Ry. Co.*, 328.

5. SPECIAL AND GENERAL VERDICTS. Where special verdict covered every issue, general verdict was unnecessary to authorize judgment. *In re Hansen's Will*, 207.
6. FAILURE TO CHARGE—NECESSITY OF REQUEST—UNDUE INFLUENCE. Under Comp. Laws 1907, section 3147, in will contest, where court ruled at beginning that burden was on proponent, but charged that as to issue of insanity only burden was on protestant, its failing to charge as to burden on issue of undue influence was erroneous, though proponent's counsel did not request instruction. *In re Hansen's Will*, 207.
7. INSTRUCTIONS — PROVINCE OF JURY — UNCONTESTED FACTS. Where it was undisputed that gas had been found in employer's mine, *held* that court properly refused to submit question whether the mine was one known to generate explosive gases. *Elegant v. Standard Coal Co.*, 585.
8. REFUSAL OF REQUESTS COVERED BY CHARGE GIVEN. Refusal of requested instruction covered by the general charge *held* proper. *Elegant v. Standard Coal Co.*, 585.
9. IMMATERIAL FINDING. Finding on question of fact which could not avail defendant as defense was immaterial. *Mills v. Gray*, 224.
10. FAILURE TO FIND ON IMMATERIAL MATTER. Failure to find on immaterial matter is not error. *Mills v. Gray*, 224.

TRUSTS.

1. CONSTRUCTIVE TRUSTS—FOLLOWING TRUST PROPERTY. A trust will not be impressed upon funds or property in the hands of the alleged trustee where the original trust property or trust fund cannot be traced or identified either in its original or substituted form. *Kent v. Kent*, 44.
2. SAME—PLEADING. A complaint setting up receipt of funds by alleged trustee for investment, the investment of such money, the mingling and confusion thereof with private funds of trustee, and that such trust property cannot be traced or segregated, *held* to preclude plaintiff from establishing trust on property of alleged trustee. *Kent v. Kent*, 44.
3. RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER. Where a wife held title to property real and personal part of which her husband inherited and part purchased with his money, *held* that such property was held by her in trust for husband. *Wheelwright v. Roman*, 10.
4. SAME—HUSBAND'S PROPERTY HELD BY WIFE. Where wife held title to sole property real and personal of her husband in trust for him and made deeds and assignments of mortgages to him which were not registered and of which she retained possession, *held*, that the property after her death belonged to the husband. *Wheelwright v. Roman*, 10.

ULTRA VIRES. See "BANKS AND BANKING."

UNDUE INFLUENCE. See "WILLS."

VENDOR AND PURCHASER.

1. **SALE—EVIDENCE—SUFFICIENCY.** In action for breach of contract by plaintiff assignee for benefit of creditors against defendant purchaser of property, evidence *held* sufficient to show valid contract of sale between plaintiff and defendant. *Utah Ass'n of Credit Men v. McConnell*, 531.
2. **OPTION—MEETING OF MINDS—RECOVERY OF PAYMENT.** If minds of parties executing option agreement fail to meet upon question of amount of land to be conveyed plaintiff could recover from defendant amount paid thereunder. *Tyng v. Constant-Lorraine Inv. Co.*, 1.
3. **RECOVERY OF MONEY PAID—FRAUD.** In action to recover payments made on orchard land, evidence *held* sufficient to show that certain defendants, though they participated in organization of corporation, which owned no such land and had small assets, were parties to the fraud. *Roper v. Crosier*, 262.
4. **SAME—SAME.** Appellant, who participated in organization of a corporation which had no assets, and, knowing that fact, allowed his associate to acquire from plaintiff valuable land in payment on a contract for conveyance of orchard land, when the corporation owned no such land, *held* liable to plaintiff for the amount of such payment. *Roper v. Crosier*, 262.
5. **RECOVERY OF MONEY PAID—PLEADING.** In a suit to recover money deposited to secure payment by the vendee of land under entryman's agreement to sell it as soon as proofs were completed, unless it appeared in the agreement or on the face of the complaint that the plaintiff was not qualified to make entry of land, the complaint was not subject to general demurrer. *Coburn v. Bartholomew*, 566.
6. **FAILURE OF CONSIDERATION—RIGHT TO RECOVER.** Where defendant agreed to convey land entered by him, to plaintiff when proofs were completed and to deposit a share of an irrigation company to insure plaintiff's being able to secure water, there was no basis for contention that plaintiff purchased the water share outright. *Coburn v. Bartholomew*, 566.
7. **RECOVERY OF PRICE—FORM OF REMEDY.** Under Comp. Laws 1907, section 3498, as to recovery of debts secured by mortgage where plaintiff agreed to buy land and paid half the price which defendant secured by depositing in escrow a share in an irrigation company, and defendant who had entered the land failed to complete entry, plaintiff's remedy was foreclosure and not action for breach of contract. *Coburn v. Bartholomew*, 566.

VENUE. See "CORPORATIONS."

1. **ASSIGNMENT OF CAUSE OF ACTION—ASSIGNOR'S RESIDENCE.** Whenever cause of action is assigned without consideration, assignor continuing as real party in interest, assignee is merely trustee, and assignor, real party in interest, is person in whose favor cause of action arose within Comp. Laws 1907, sec. 293x1, providing that all transitory causes of action arising without state in favor of residents shall be brought and tried in county where the resident resides, etc. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.
2. **CHANGE—FICTITIOUS ASSIGNMENT.** Assignment of cause of action, with or without consideration, made solely to confer jurisdiction on

court in which action is commenced, thereby depriving defendant of privilege afforded by statutes relating to venue, will not prevail against proper proceeding to change place of trial. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.

3. APPLICATION FOR CHANGE. If application for change of venue is based on ground that action is brought in wrong county, it should negative any facts under which such county would be proper. *Dee v. San Pedro, L. A. & S. L. R. Co.*, 167.

WARRANTY. See "SALES."

WATERS AND WATER COURSES.

1. APPROPRIATION OF WATER—IRRIGATION FOR WILD FOWL—STATUTE. Under Comp. Laws 1907, sec. 1288x6, as amended by Laws 1909, c. 62, and section 1288x16, as amended by Laws 1915, c. 83, appropriation of water cannot be made for irrigation of unsurveyed, uninclosed, unoccupied public domain of United States for the sole production of food for wild water fowl. *Lake Shore Duck Club v. Lake View Duck Club*, 76.
2. APPROPRIATION FOR WATER APART FROM LAND. Water may be appropriated and used on public domain, and right sustained though appropriator never acquires title to land, and his right will be upheld after he is dispossessed of the land. *Lake Shore Duck Club v. Lake View Duck Club*, 76.
3. CONTRACTS—CONSTRUCTION. Under contract between city and plaintiff, which recognized plaintiff's perpetual right to water from city's canal, *held*, that where, through change in character of lands, water could no longer be profitably diverted from place where diversion had occurred, plaintiff could divert water at another point. *Moyle v. Salt Lake City*, 357.
4. APPROPRIATORS—CHANGE OF POINT OF DIVERSION. Appropriator of water, who is entitled to given amount, may, for purpose of increasing benefit from his use, change point of diversion. *Moyle v. Salt Lake City*, 357.
5. DIVERSION—DAMAGES—SUFFICIENCY OF EVIDENCE. On counterclaim for damages from plaintiff's diversion of water, used by defendants to irrigate their lands, evidence *held* sufficient to support the findings of the jury that defendants sustained damages in the sum of \$266. *Cleary v. Daniels*, 505.
6. APPROPRIATION—DIVERSION—INSTRUCTION. In action over waters of creek, defendants claiming plaintiff diverted waters from their lands, instruction *held* not to have submitted to jury any true or correct rule by which defendants' damages could have been determined. *Cleary v. Daniels*, 505.
7. PRESCRIPTIVE RIGHTS—PERIOD OF USE OF WATER—SUFFICIENCY OF EVIDENCE. In suit over right to use waters of spring, evidence *held* to show that there was only part of year within which defendant had used and could use the waters for irrigation. *Cleary v. Daniels*, 494.
8. SAME—EXTENT—PREVENTION OF USE BY ANOTHER. Defendant, having prescriptive right to use waters of spring for irrigation from

May to August, cannot prevent plaintiff from using water when she (defendant) cannot use it. *Cleary v. Daniels*, 494.

9. **SAME—BENEFICIAL USE.** Though defendant had prior and paramount prescriptive right to use waters of spring for irrigation as against plaintiff, she had no right to waters except as she put them to beneficial use. *Cleary v. Daniels*, 494.
10. **APPROPRIATION—QUANTITY.** Prior appropriator of water does not acquire title to specific water, but merely right to use of specific quantity for limited time in year or during whole year; though owner has acquired prior right to use of water, if he does not use it during portion of year, or cannot make it available by reason of natural conditions, another may use it while he cannot. *Cleary v. Daniels*, 494.
11. **SAME—RIGHT TO WATER—SUFFICIENCY OF EVIDENCE.** In suit over waters of creek, evidence *held* to support findings of court that defendants and intervener were entitled to use of all the waters. *Cleary v. Daniels*, 494.
12. **NATURAL STREAMS—CONVEYANCE OF RIGHT.** In view of Comp. Laws 1907, sec. 1288x32, deed to land in statutory form, without reservation of water, conveys whatever right grantor has to water appurtenant to land. *Anderson v. Hamson*, 151.
13. **SURFACE STREAMS—RIGHT OF USE—PRESCRIPTION.** Where landowner has acquired right to use all of water of stream, it is unnecessary, in suit to establish his right, to determine the exact quantity in second feet or acre feet which he was entitled to use. *Anderson v. Hamson*, 151.

WILLS.

1. **PROBATE—CONTEST—EXAMINATION OF WITNESS.** Where there is contest of will offered for probate, witnesses may be required to answer respecting due execution and capacity of testator before jury, with privilege of cross-examination by protestant, so that in will contest court properly impanelled jury before hearing evidence as to due execution. *In re Hansen's Will*, 207.
2. **CONTEST—BURDEN OF PROOF.** It is duty of proponent of will to produce proof respecting capacity of testator and due execution, burden being on proponent as to such matters, but when he has made prima facie case, burden is on protestant to overcome it and to produce proof respecting matters presented in protest. *In re Hansen's Will*, 207.
3. **INSANITY OF TESTATOR—EVIDENCE.** In will contest on ground of insanity, contestant must establish insanity by preponderance of evidence. *In re Hansen's Will*, 207.
4. **UNDUE INFLUENCE—BURDEN OF PROOF.** Burden of proof on issue of undue influence rests with protestant. *In re Hansen's Will*, 207.
5. **SAME—SUFFICIENCY OF EVIDENCE.** In will contest, evidence *held* insufficient to support jury finding of undue influence. *In re Hansen's Will*, 207.
6. **RIGHT OF TESTAMENTARY DISPOSITION.** If testator was of sound and disposing mind and memory when he made his will, under law

he had sole right to choose objects of bounty, whether what he did was approved or disapproved by court or jury. *In re Hansen's Will*, 207.

7. **TESTAMENTARY CAPACITY—ECCENTRICITIES AND IDIOSYNCRASIES—“INSANITY.”** Eccentricities and idiosyncracies, however gross, do not constitute insanity, and cannot incapacitate one otherwise mentally sound from making a valid will. *In re Hansen's Will*, 207.
8. **SANITY OF TESTATOR—SUFFICIENCY OF EVIDENCE.** Evidence held to support jury's special finding that testator was not insane when he made the will. *In re Hansen's Will*, 207.
9. **LOST WILLS—PRESUMPTIONS.** When testator made a will which could not be found at his death, ordinarily presumption arises that he himself destroyed it for purpose of revoking it. *In re Frandsen's Will*, 156.
10. **SAME—PROOF—SUFFICIENCY.** Under Comp. Laws 1907, sec. 3810, evidence held sufficient for admission of lost will to probate. *In re Frandsen's Will*, 156.
11. **CONTEST—GROUNDS—OMITTING BENEFICIARIES.** That will made no provision for protestant, testatrix's granddaughter, was not ground for contest, but a matter which could be presented upon final distribution as provided by Comp. Laws 1907, sec. 2762. *In re Frandsen's Will*, 156.

WITNESSES.

1. **REFRESHING RECOLLECTION—DISCRETION.** Whether written memorandum may be referred to by witness to revive present recollection, or as record of past recollection, is largely within discretion of trial court. *Sagers v. International Smelting Co.*, 423.
2. **SAME—Instrument becomes record of past recollection only when it fails to revive present recollection, and, in such case witness must be able to state positively when it was made and that it was true.** *Sagers v. International Smelting Co.*, 423.
3. **SAME—SAME.** Court did not abuse discretion in permitting plaintiff, while testifying as to acreage and kinds of crops grown on certain land for certain years, to refresh present recollection by reference to memorandum made by him three years after crop was grown. *Sagers v. International Smelting Co.*, 423.
4. **PRIVILEGED COMMUNICATIONS—PHYSICIANS.** That insured was afflicted with and died of cancer, and that, after physicians had told him that disease was incurable, insured voluntarily stated that he had been suffering with his stomach and pains in his back, could not be proved by testimony of insured's attending physician, in view of Comp. Laws 1907, sec. 3414, as amended by Laws 1911, c. 199. *Lombard v. Columbia Nat. Life Ins. Co.*, 554.

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